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Vol 1981

In the United States
Circuit Court of Appeals
For the Ninth Circuit. /

LIQUID VENEER CORPORATION, a corporation,
Appellant,

vs.

LENA G. SMUCKLER doing business as FRENCH
VENEER MANUFACTURING COMPANY,
Appellee.

Transcript of Record.....	210

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

FILED

MAR 3 - 1936

PAUL P. O'BRIEN,
CLERK

In the United States
Circuit Court of Appeals
For the Ninth Circuit.


LIQUID VENEER CORPORATION, a corporation,
Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Appellant:

BICKSLER, PARKE & CATLIN, Esqs.,
W. G. DANIELSON, Esq.,
Title Insurance Building,
Los Angeles, California.

PAUL V. SHEEHAN, Esq.,
1712 Liberty Bank Building,
Buffalo, New York.

For Appellee:

HARRY GRAHAM BALTER, Esq.,
440 Van Nuys Building,
Los Angeles, California.

United States of America, ss.

To LENA G. SMUCKLER, doing business as FRENCH
VENEER MANUFACTURING COMPANY

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 18th day of January, A. D. 1936, pursuant to Order allowing appeal filed December 1935 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled LENA G. SMUCKLER, doing business as FRENCH VENEER MANUFACTURING COMPANY, plaintiff, vs LIQUID VENEER CORPORATION, a corporation, Defendant, No. 5558-C, wherein defendant LIQUID VENEER CORPORATION, a corporation, is appellant, and you are Appellee to show cause, if any there be, why the Judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEO. COSGRAVE, United States District Judge for the Southern District of California, this 19th day of December, A. D. 1935, and of the Independence of the United States, the one hundred and Sixtieth.

Geo. Cosgrave

U. S. District Judge for the Southern District of
California.

[Endorsed]: Copy of this citation received and acknowledged this 19 day of December 1935 Harry Graham Balter Attorney for Lena G. Smuckler, plaintiff and appellee Filed Feb 13 1936 R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE
COUNTY OF LOS ANGELES.

LENA G. SMUCKLER, doing)	
business as FRENCH VENEER :	
MANUFACTURING COM-)	332470
PANY, :	
Plaintiff,)	
:	COMPLAINT.
:	
-vs-)	(Libel)
LIQUID VENEER CORPORA-)	
TION, a corporation, :	
Defendant.)	

Comes now the plaintiff and for cause of action against the defendant alleges, as follows, to-wit:

I.

That at all times herein mentioned the plaintiff was, and now is, a resident of the City of Los Angeles, County of Los Angeles, State of California.

II.

That at all times herein mentioned, LIQUID VENEER CORPORATION was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York.

III.

That at all times herein mentioned the plaintiff has been doing business under the fictitious name and style of FRENCH VENEER MANUFACTURING COMPANY, and has duly recorded said fictitious name in the manner prescribed by the laws of the State of California.

IV.

That the plaintiff, for many years last past, has been engaged in the preparation and/or manufacture and sale and exploitation of a furniture and automobile polishing preparation, and has exploited said product, sold said product and distributed said product under the style and sales name of "French Veneer," and that as such she has established a large and profitable business in the manufacture and/or sale and/or exploitation and/or distribution of the said product.

V.

That the defendant, LIQUID VENEER CORPORATION, a corporation, has for many years last past been engaged in the manufacture and/or sale and/or distribution of a furniture polish under the style and/or label of Liquid Veneer.

VI.

That for a long time prior to this date, the defendant has continuously and systematically and for the purpose of injuring the reputation and the business conducted by this plaintiff, caused letters to be mailed to various customers of this plaintiff for the purpose of destroying the business relations that existed between plaintiff and her customers, and that said letters were written for the purpose of wilfully and maliciously injuring the good

name of the plaintiff and for the further purpose of destroying the business that plaintiff has established in the State of California and elsewhere, and that within one year last past the defendant, in furtherance of its plan and scheme to injure and destroy the plaintiff's good name and reputation did wilfully and maliciously compose, publish and cause to be published a letter addressed to Young's Market Company at Los Angeles, California, which letter reads as follows:

“LIQUID VENEER CORPORATION

London, England—Bridgburg, Canada.

Manufacturers of

HOUSEHOLD AUTOMOTIVE SPECIALTIES

Buffalo, N. Y.

U. S. A.

June 2, 1931.

YOUNG'S MARKET,

7th Street,

Los Angeles, California.

ATTEN. General Manager

Gentlemen:—

Our inspector reports your selling and offering for sale a product called “French Veneer”, this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark “Liquid Veneer” as well as our common law rights.

We recently found this product on sale at the May Company. We have explained our position to the May

Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Courts as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

We have had more or less difficulty with these people who manufacture this so-called "French Veneer," have tried to purchase evidence against them individually, but they moved around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

It is a different matter, however, where we find a responsible house, like yourselves, handling an infringing product, because at the end of a law suit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We therefore request that you immediately discontinue the sale of this infringing product and advise us to that effect promptly.

The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to some-

one else, who has spent a fortune in building up their business under that name.

His object for adopting the name "French Veneer" is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing "French Veneer" which she had been using for years. This housewife on finding that she had purchased the wrong Veneer returned it to the May Company and received the proper genuine "Liquid Veneer".

We will await your prompt reply, and remain, meanwhile,

Yours very truly,

LIQUID VENEER CORPORATION.

MARTIN J. CABANA

Vice President."

VII.

That by the foregoing false, malicious and defamatory language, the defendant, Liquid Veneer Corporation, intended to and did convey the meaning that the plaintiff had infringed upon a right that the defendant, Liquid Veneer Corporation, was exclusively possessed of, and that the plaintiff was wrongfully and unlawfully selling a product to said Young's Market and other numerous customers of plaintiff, and that the plaintiff moved around from one place to another so that she could not be found, and that when found that she denied her identity and that the Plaintiff was further irresponsible, both financially and otherwise, and that she was not a fit person to do business with, and that by reason of said false and malicious letters aforementioned, said Young's Market and other numerous customers of the Plaintiff, refused to carry on or do any business with the plaintiff and by rea-

son of the facts of the defendant aforementioned, plaintiff and her business have been damaged.

VIII.

That at the time of the commission of the grievances, herein mentioned, the plaintiff had always maintained a good reputation and credit.

IX.

That the statements contained in the communications addressed by the defendant, Liquid Veneer Corporation, were false, malicious and untrue, and were made only for the purpose of destroying the good name and reputation and business of this plaintiff, and that by reason of the said false, malicious and defamatory publication aforesaid, plaintiff has been and is greatly injured and prejudiced, and that the reputation of her business has been prejudiced and injured and she has lost and been deprived of great gain and profit which would otherwise have arisen and accrued to her in her said business, all to her damage in the sum of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS.

WHEREFORE, plaintiff prays for judgment as follows:

1. In the sum of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS for damages actually suffered.
2. For such sum that the court may deem just and equitable in the form of exemplary and/or punitive damages.
3. For her costs and disbursements herein incurred.
4. For such other and further relief as the Court may deem just and equitable in the premises.

Elijah M. Smuckler
Attorney for Plaintiff.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

LENA G. SMUCKLER being by me first duly sworn, deposes and says: that she is the Plaintiff in the above entitled action; that she has read the foregoing Complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

LENA G. SMUCKLER.

Subscribed and sworn to before me this 4th day of November, 1931

[Seal]

ELIJAH M. SMUCKLER

Notary Public in and for the County of Los Angeles,
State of California.

(ENDORSED): No. 332470 COMPLAINT Filed
1931 Dec 17 P. M. 3:41 L. E. Lampton County Clerk By
W. L. Greene Deputy

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE
COUNTY OF LOS ANGELES.

LENA G. SMUCKLER, doing business)		
as FRENCH VENEER MANUFAC-)		
TURING COMPANY,)		
Plaintiff)		
	)	332470
vs)		
)	
LIQUID VENEER CORPORATION,)		
a corporation,)		
Defendant.)		

WHEREAS, the above named plaintiff has commenced or is about to commence an action in the Superior Court of the State of California, in and for the County of Los Angeles, against the above named defendant; said action being based upon alleged libel, uttered and published by said defendant against said plaintiff, and

WHEREAS, said LENA G. SMUCKLER is required to furnish bond in the sum of FIVE HUNDRED (\$500.00) DOLLARS, as security for the payment of any and all costs which may be awarded against her in the prosecution of said action.

NOW, THEREFORE, the condition of this obligation is such that if the said action be dismissed or the defendant recover judgment that S. S. Wolfson and M. Lowis of the County of Los Angeles, State of California

do hereby jointly and severally undertake and promise to pay such costs and charges as may be awarded against the plaintiff by judgment or in the process of the action, or on an appeal not exceeding the said sum of FIVE HUNDRED (\$500.00) DOLLARS, to which amount we acknowledge ourselves jointly and severally bound.

S. S. Wolfson

M. Lewis

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES.)

S. S. WOLFSON and M. LOWIS the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says: that he is a resident and free holder in the County of Los Angeles, State of California, and is worth the sum of FIVE HUNDRED (\$500.00) DOLLARS in said undertaking specified over and above of his just debts and liabilities exclusive of property exempt from execution.

S. S. WOLFSON

M. LOWIS

Subscribed and sworn to before me this 28th day of November, 1931.

[Seal]

ELIJAH M. SMUCKLER

Notary Public in and for said County and State.

(ENDORSED): No. 332470 BOND Filed 1931 Dec 17 PM 3 41 L. E. Lampton, County Clerk, By W. L. Greene, Deputy.

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE
COUNTY OF LOS ANGELES.

LENA G. SMUCKLER, doing business)	
as FRENCH VENEER MANUFAC-)	
TURING COMPANY,)	
	Plaintiff,) No. 332470
)
vs.)	PETITION
)
LIQUID VENEER CORPORATION,)	
a corporation,)	
	Defendant.)

PETITION OF THE DEFENDANT FOR RE-
MOVAL TO THE DISTRICT COURT OF THE
UNITED STATES, IN AND FOR THE SOUTH-
ERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

TO: The Honorable Superior Court of the State of Cali-
fornia, in and for the County of Los Angeles:

Your petitioner, appearing specially herein for the purpose only of petitioning this Honorable Court to remove this cause to the District Court of the United States, in and for the Southern District of California, Central Division, and without in any wise submitting its person to the jurisdiction of this Honorable Court, or of the District Court of the United States, in and for the Southern District of California, Central Division, respectfully shows to this Honorable Court:

I.

That the plaintiff is now, and at the time of the commencement of this action was, a citizen and resident of the County of Los Angeles, State of California.

II.

That your petitioner herein is now, and at the time of the commencement of this action was, a corporation organized and existing under and by virtue of the laws of the State of New York, as alleged in Paragraph II of said complaint.

III.

That the above entitled action was commenced against your petitioner in the Superior Court of the State of California, in and for the County of Los Angeles, which said action is of civil nature.

IV.

That defendant files this, its petition for removal of the said cause from the Superior Court of the State of California, in and for the County of Los Angeles, in which it is now pending, to the District Court of the United States, in and for the Southern District of California, Central Division, held in the City of Los Angeles, State of California.

V.

That no service of summons and complaint has been made upon your petitioner, whether personally or by publication. In this connection, your petitioner is informed and believes, and therefore alleges that plaintiff has made an attempted and purported service of summons and complaint upon your petitioner by serving the same upon the Secretary of State of the State of California, with direc-

tions to said Secretary of State to deliver one copy thereof to C. E. Mack, 1890 Grove Street, San Francisco. Your petitioner shows to this Honorable Court that the said pretended service of summons upon the said Secretary of State of the State of California was not service of summons upon your petitioner, and your petitioner further shows that in petitioning for the removal of the said cause to the District Court of the United States, in and for the Southern District of California, Central Division, your petitioner has appeared specially, as aforesaid, for the purpose only of petitioning for said removal, and without in any way submitting itself to the jurisdiction either of this Honorable Court or of the said District Court of the United States, in and for the Southern District of California, Central Division, and reserving to itself the right after removal of said cause to the District Court of the United States in and for the Southern District of California, Central Division, of specially appearing therein and moving said Court to quash, vacate and set aside the alleged and pretended service of summons and complaint upon your petitioner herein.

VI.

That plaintiff brings this action at law for the purpose of obtaining judgment for damages in the amount of One Hundred Thousand Dollars (\$100,000) and punitive damages alleged to have been sustained by plaintiff by reason of alleged false, malicious and defamatory publications by defendant of certain letters set forth in the complaint herein.

VII.

That the matter in dispute exceeds the sum of Three Thousand Dollars (\$3,000), exclusive of interest and costs.

VIII.

That the controversy herein is now and was at the time of the commencement of the said suit, one wholly between citizens of different states, to wit, between plaintiff herein, a citizen and resident of the State of California, and your petitioner herein, a citizen and resident of the State of New York.

IX.

That there is presented herewith a good and sufficient bond as by statute in such cases made and provided, which said bond is in the penal sum of One Thousand Dollars (\$1,000), and is conditioned upon the entering into the District Court of the United States, in and for the Southern District of California, Central Division, within thirty (30) days from the date of the filing of this petition, of a certified copy of the record in this action, and the payment of all costs which may be awarded by said Court, if the said District Court of the United States shall hold this suit wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays that this Court proceed no further herein, except to approve the bond presented herewith and to make the order of removal as required by law, and to direct a transcript of the record herein to be prepared by the Clerk of this Honorable Court, to be filed with said District Court of the United States, in and for the Southern District of California, Central Division, in the manner and form as provided by law.

GIBSON, DUNN & CRUTCHER,

By Norman S. Sterry,

Attorneys for Liquid Vencer Corporation, appearing
specially and for the purpose of this Petition only.

THE AETNA
CASUALTY AND SURETY
[Emblem] COMPANY
HARTFORD CONNECTICUT
MORGAN B. BRAINARD
President

Premium \$10.00 for the term

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE
COUNTY OF LOS ANGELES

LENA G. SMUCKLER, doing)		
business as FRENCH VENEER)		
MANUFACTURING CO.,)		UNDERTAKING
Plaintiff)		ON REMOVAL
vs.)		
LIQUID VENEER CORPORA-)		No. 332470
TION, a corporation,)		
Defendant.)		

KNOW ALL MEN BY THESE PRESENTS: That The Aetna Casualty and Surety Company, as Surety, is held and firmly bound unto Lena G. Smuckler doing business as French Veneer Manufacturing Co., Plaintiff in the above entitled action, her legal representatives, administrators, and assigns, in the sum of One Thousand (\$1000.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made it binds itself, its successors and assigns, as the case may be jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT,

WHEREAS, the above named Defendant has applied by petition to the Superior Court of the State of California, in and for the County of Los Angeles, for the removal of a certain cause therein pending, wherein Lena G. Smuckler doing business as French Veneer Manufacturing Co. is Plaintiff and Liquid Veneer Corporation, a corporation is Defendant, to the District Court of the United States for the Southern District of California, Central Division, for further proceedings on the grounds in said petition set forth, and that all further proceedings in said action in said Superior Court be stayed;

NOW THEREFORE, if the above named Defendant shall, within thirty (30) Days from and after the date of the filing of said petition, enter in said District Court of the United States of America, a duly certified copy of the record in the above entitled action, and shall pay or cause to be paid all costs that may be awarded therein by the District Court of the United States, if such Court shall hold that such action was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and effect.

Dated at Los Angeles, California this 25th day of March, 1932.

[Seal]

THE AETNA CASUALTY AND
SURETY COMPANY

BY JOSEPH I. JOHNSON
Resident Vice President

ATTEST M. A. PAGE
Resident Assistant Secretary

STATE OF CALIFORNIA,)
) ss.
 COUNTY OF LOS ANGELES.)

On this 25th day of March, in the year nineteen hundred 32, before me, Mary E. Rogers, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Joseph I. Johnson, known to me to be the Resident Vice-President and M. A. Page, known to me to be the Resident Assistant Secretary of THE AETNA CASUALTY AND SURETY COMPANY, the corporation which executed the within and annexed instrument and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

Mary E. Rogers

Notary Public in and for said Los Angeles County, State of California.

My commission expires Mar 11 1934

The foregoing bond on removal is hereby approved as to form and sufficiency of surety, this 25th day of March, 1932.

LEWIS HOWELL SMITH

Judge

Received copy of the within Notice this 26th day of March, 1932

ELIJAH M. SMUCKLER

Attorney for Plaintiff

[Endorsed]: Filed Mar. 26 A. M. 11:03, 1932 L. E. Lampton, County Clerk By W. L. Greene Deputy.

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE
COUNTY OF LOS ANGELES

March 30, 1932. Present Hon. Lewis Howell Smith, Judge.

Lena G. Smuckler, etc.,)	
)	
Plaintiff,)	
	)	No. 332470
vs)	
	)	Dept. 43
Liquid Veneer Corporation, etc.,)	
)	
Defendant.)	

Petition and bond for removal to the United States District Court for the Southern District of California, Central Division, comes on for hearing, E. M. Smuckler appearing as attorney for the plaintiff and Gibson, Dunn et al by Ira C. Powers for the defendant. Said petition is granted.

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE
COUNTY OF LOS ANGELES

—oOo—

LENA G. SMUCKLER, doing)	
business as FRENCH VENEER)	No. 332470.
MANUFACTURING COM-)	
PANY,	) ORDER FOR
Plaintiff,)	REMOVAL OF
)	CAUSE TO
vs.)	THE UNITED
)	STATES
LIQUID VENEER CORPORA-)	DISTRICT
TION, a corporation,)	COURT
Defendant.)	

—oOo—

On reading and filing the verified petition of LIQUID VENEER CORPORATION, defendant, for the removal of the above entitled action to the District Court of the United States, in and for the Southern District of California, Central Division, and upon a bond in proper form and with good and sufficient surety being filed in this court, and it appearing to the court that due notice of the filing of said petition and bond for removal has been given to the adverse parties prior to the filing of said petition and bond, and good cause appearing therefor,

IT IS HEREBY ORDERED that the record in the above entitled case be duly certified to the said United States District Court in the manner provided by law;

AND IT IS FURTHER ORDERED that no further proceedings be had in this court in the above entitled action.

DATED: March 30, 1932.

Lewis Howell Smith

Judge.

FILED Mar. 30, 1932. L. E. LAMPTON, County Clerk By M. E. Howard, Deputy.

STATE OF CALIFORNIA)
) SS
 COUNTY OF LOS ANGELES) No. 332470

I, L. E. LAMPTON, County Clerk and Clerk of the Superior Court, do hereby certify the foregoing copies of documents and orders consisting of

Complaint, Bond on Libel, Notice of filing petition for removal including copies of Petition and Undertaking on removal, Petition for Removal, Bond on Removal, Minute Order of March 30, 1932 granting petition for removal, and formal Order for Removal to the District Court of the United States for the Southern District of California (Central Division) in the action of

LENA G. SMUCKLER, doing business as FRENCH VENEER MANUFACTURING COMPANY VS LIQUID VENEER CORPORATION, a corporation, to be full, true and correct copies of all of the original documents on file in this office, and proceedings of record in said action at the time Order for Removal was filed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court this 25th day of April, 1932.

[Seal]

L. E. LAMPTON,

County Clerk and Clerk of the Superior Court of the State of California in and for the County of Los Angeles.

By F. P. Chrisman,
 Deputy.

[Endorsed]: NO. 5558-C Filed Apr 25 1932. R. S. Zimmerman, Clerk, by M. L. Gaines, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1932, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 7th day of November in the year of our Lord one thousand nine hundred and thirty-two.

Present:

The Honorable GEORGE COSGRAVE, District Judge.

Lena G. Smuckler, doing business as)	
French Veneer Manufacturing Com-)	
pany,)	
Plaintiff,)	
	) No. 5558-C-Law
vs.)	
)
Liquid Veneer Corporation, a corpo-)	
ration,)	
Defendant.)	

Under date of July 11, 1932, this cause having come before the Court for hearing on motion of Liquid Veneer Corporation, a corp., appearing specially, to quash pretended service of summons, etc., and after argument of counsel appearing at that time having been ordered to stand submitted on briefs to be filed, and points and authorities having been filed, and duly considered by the Court, upon consideration whereof, it is now by the Court ordered that the motion to quash be granted. Exception to plaintiff.

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE
COUNTY OF LOS ANGELES

LENA G. SMUCKLER, doing
business as FRENCH VENEER
MANUFACTURING COM-
PANY

Plaintiff,

vs.

LIQUID VENEER CORPORA-
TION, a corporation,
Defendant.

No. 332470

Action brought in
the Superior Court
of the County of Los
Angeles, and Com-
plaint filed in the
Office of the Clerk
of the Superior
Court of said
County.

THE PEOPLE OF THE STATE OF CALIFORNIA
SEND GREETINGS TO: LIQUID VENEER
CORPORATION, a corporation Defendant.

You are directed to appear in an action brought against you by the above named plaintiff..... in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff..... will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 17th day of Dec. 1931.

[Seal Superior Court

Los Angeles County]

L. E. LAMPTON,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By W. L. Greene

Deputy.

W. L. GREENE

NOTICE

APPEARANCE: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk.

[Cut]

STATE OF CALIFORNIA DEPARTMENT OF STATE

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify:

That on the 1st day of March, 1932, duplicate copies of the Complaint and Summons, in the case of LENA G. SMUCKLER, vs LIQUID VENEER CORPORATION, were served on me, as Secretary of State, which copies

were accompanied by the fee of \$5.00 prescribed by Section 406a of the Civil Code of the State of California, and the statement required by said Section of the address of the defendant corporation, to-wit, Buffalo, New York, and also the address of the Pacific Coast Representative, C. E. Mack, 1890 Grove Street, San Francisco, California.

I FURTHER CERTIFY that on the 2nd day of March, 1932, I advised the defendant corporation at the addresses above stated, by prepayed telegram, of the fact of the service upon me of duplicate copies of said Complaint and Summons, and that on said date I deposited in the United States Post Office, at Sacramento, California, a sealed envelop addressed, as above, with postage thereon fully prepayed, including postage for the transmission of said envelopes by registered mail, and that said enveloped each contained a copy of said Complaint and Summons.

I FURTHER CERTIFY that the records of this office do not contain the name of said defendant corporation, or show the location of its offices.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California, to be hereto affixed this 2nd day of March, 1932.

[Grea Seal of
State of California]

FRANK C. JORDAN,
Secretary of State.

By Robert V. Jordan,
Assistant Secretary of State.

[Endorsed]: Filed Dec. 22, 1932 R. S. Zimmerman,
Clerk By J. M. Horn, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

ANSWER OF DEFENDANT LIQUID VENEER
CORPORATION.

Comes now the above named defendant, still appearing specially without submitting itself to the jurisdiction of the court, but especially reserving and insisting upon its objection to such jurisdiction as made in its motion to vacate, set aside and quash the pretended service of summons herein, which motion was denied by the court with the privilege reserved to defendant of renewing the same at the time of trial, and especially challenging and denying the jurisdiction of the court over the defendant, and reserving its right to so renew said motion, by way of answer to plaintiff's complaint alleges as follows:

I.

That defendant has no information or belief upon the subject of the matters alleged in paragraph I of the complaint sufficient to enable it to answer thereto, and basing its denial on that ground it denies each and all of the allegations therein contained.

II.

Defendant admits the allegations contained in paragraph II of the complaint.

III.

That as to the allegations contained in paragraph III of the complaint, defendant has no information or belief upon the subject sufficient to enable it to answer thereto, and basing its denial on that ground, denies each and all of the allegations therein contained.

IV.

That in answer to paragraph IV of the complaint defendant denies that plaintiff has for many years last past, or at all, been engaged in the business of preparation and/or manufacture and/or sale and/or exploitation of the articles therein mentioned, but it admits and alleges that for approximately two (2) years next preceding the month of June, 1931, intermittently and from time to time plaintiff sold and caused to be sold a liquid polishing material designated and called "French Veneer," but denies that plaintiff during said period of time, or at all, had established or possessed a large and/or profitable business in the manufacture and/or sale and/or exploitation and/or distribution of said product French Veneer, and defendant alleges that plaintiff's transactions involving said product were of a nominal nature and never yielded a substantial, or any, profit to her.

V.

Defendant admits the allegations contained in paragraph V of the complaint.

VI.

That in answer to paragraph VI of the complaint defendant alleges:

(a) That it denies that for a long time prior to the date of the complaint, or at all, defendant has continuously and/or systematically, or at all, caused letters to be mailed to various customers of plaintiff for the purpose of injuring plaintiff's business or the relations of plaintiff with her customers, and denies that any letters mailed by it to persons who were customers of plaintiff were mailed for the purpose of wilfully and/or wrongfully in-

juring the good name of plaintiff or destroying her business.

(b) That it denies that at any time, or at all, in furtherance of a plan and/or scheme to injure plaintiff's good name and/or reputation it wrote or caused to be written and/or mailed the letter set forth in said paragraph VI.

(c) That it admits that on or about the month of June, 1931, it wrote and mailed a letter concerning the infringement of its trade-mark, "Liquid Veneer," addressed to Young's Market, *by* denies specifically that in writing said letter, or any letter, it was prompted by any malice towards plaintiff, or desire or intent to injure her; and defendant is informed and believes and upon such information and belief alleges the fact to be that the letter set forth in said paragraph VI is not the said letter or any letter written and/or mailed by it.

VII.

That defendant specifically denies each and all of the allegations, matters and things set forth in paragraph VII of the complaint, save and except that it admits that the letter mailed by it to Young's Market conveyed the meaning that the use of the name French Veneer as applied to a liquid polishing material was an infringement of defendant's trade-mark, "Liquid Veneer."

VIII.

That defendant denies specifically each and every allegation contained in paragraph VIII of the complaint in so

far as the same alleges or charges that plaintiff had always or at all maintained and/or did at the time stated, or at any other time, maintain a good business reputation and/or credit.

IX.

That defendant denies that the statements, or any of them, contained in the said, or any, communication addressed by it to Young's Market were either false, malicious or untrue, and denies that said statements, or any of them, were made for the purpose of destroying the good name and/or reputation and/or business of plaintiff, but alleges that any and all such communications were mailed in good faith and for the purpose of protecting defendant's trade-mark, trade name, products and business from wrongful infringement and interference, and its customers from imposition.

Defendant specifically denies that by reason of the publication complained of by plaintiff, or by reason of any publication or publications made by defendant, plaintiff has been greatly or at all, injured in her reputation or business or personally; and further specifically denies that plaintiff has lost or been deprived of great, or any, gain or profit which would otherwise, or at all, have arisen or accrued to her, because of any publication of defendant; and defendant further specifically denies that plaintiff has been damaged in the sum of One Hundred Thousand (\$100,000.00) Dollars, or any sum, or at all, because or on account of the publication complained of by her, or any publication made by defendant.

AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE IN MITIGATION DEFENDANT ALLEGES AS FOLLOWS:—

I.

That it repleads and realleges all and singular the matters and things set forth in its foregoing answer and makes the same a part of this defense as fully as though again set forth herein.

II.

That the only letter written and mailed by defendant to Young's Market (whether the same shall prove to be in the words set forth in paragraph VI of the complaint or not) was written and mailed under the following circumstances, to-wit:

(a) That for a period of about thirty (30) years preceding the month of June, 1931, defendant has held, owned and continuously used a trade-mark and trade name duly and regularly issued by and registered in the Patent Office of the United States pursuant to and in accordance with the provisions of the Statutes of the United States applicable thereto, its said trade-mark and trade name being and consisting of the words, "Liquid Veneer," under which defendant had during all of said time manufactured, sold and distributed a liquid polishing material in interstate commerce throughout the United States and other countries under said trade-mark and trade name, "Liquid Veneer," and said polishing material became and is generally known by that name and is so generally known and recognized because of said name as produced and marketed by defendant under said trade-mark and trade name, "Liquid Veneer," and was and is

a very valuable asset of defendant, and the word, "veneer" was and is a material and important designating part of said name.

(b) That for several years prior to the month of June, 1931, some person or persons then unknown to defendant but styling themselves "French Veneer Manufacturing Co." had been intermittently and from time to time selling to various retail merchants in the State of California a liquid polishing material known and labelled as "French Veneer," and which was made up and labelled in imitation of the product of defendant, known as "Liquid Veneer"; that defendant was then, and is now, informed and believes that the use of said name and label, "French Veneer," was and is an infringement of its registered trade-mark and trade name, "Liquid Veneer," and alleges that the name, "French Veneer," applied to a liquid polishing material had a tendency to, and did, lead the purchasing public to believe that the product so labelled and offered under said name was "Liquid Veneer," the product of defendant.

(c) That upon learning of the use of the name "French Veneer," as aforesaid, defendant investigated the source and origin of said product, "French Veneer," and the identity of said French Veneer Manufacturing Co., and as a result of said investigation learned that French Veneer Manufacturing Co., was in fact the plaintiff herein; that thereupon defendant complained to plaintiff of her infringement of its trade-mark and trade name, whereupon she denied and disclaimed responsibility for the origin and marketing of said product, "French Veneer."

That fully believing, notwithstanding the disclaimer of plaintiff, that she was in fact the French Veneer Manufacturing Co., and was responsible for the marketing of said product and the infringement of its trade-mark and trade name, defendant fully and carefully investigated the financial responsibility of plaintiff and her ability to respond in damages for infringement of its said trade-mark, and its rights thereunder, as aforesaid, and prior to the writing and mailing of the letter which it did write and mail to Young's Market, it did learn from reliable and responsible sources, in which it reposed, and still reposes, great faith and confidence, that plaintiff and the said fictitious name and entity, "French Veneer Manufacturing Co.," were and are one and the same, and were and are without financial responsibility, and that they and each of them had been adjudicated bankrupt in the bankruptcy courts of the United States for the Southern District of California, Central Division, and at the time of writing and mailing to Young's Market the letter aforesaid, it in good faith believed that plaintiff had and was infringing its said trade-mark and trade name, and that plaintiff had endeavored to avoid discovery of her identity as the producer and marketer of "French Veneer," and that she had, upon being charged therewith, denied her identity as the person responsible for such production and marketing, and that she was so without financial responsibility; that defendant had no recourse against her at law, and in the light and knowledge of the facts aforesaid, and without malice or purpose to injure plaintiff, but

with the good faith and purpose of protecting itself from loss and injury by infringement of its trade-mark and trade name, and for the purpose of avoiding the necessity for taking legal proceedings against innocent parties, it did write and mail the letter aforesaid, fully believing that it was, and each and all of the statements therein contained were, in every respect true.

AS A FUTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE BY PLEA OF THE TRUTH, DEFENDANT ALLEGES AS FOLLOWS:—

I.

That defendant repleads and realleges all and singular the matters and things set forth in its answer and first affirmative defense and makes the same a part of this defense as fully as though again set forth herein.

II.

That defendant alleges that the matters and things stated in the letter written and mailed by it to Young's Market as aforesaid (whether the same be in the words set forth in paragraph VI of the complaint or not) were and are true; that the manufacture, advertisement and sale by plaintiff of her said product under and by the use of the said trade name and label, "French Veneer," constituted, and constitutes, an infringement of defendant's trade-mark and trade name, "Liquid Veneer," and infringed, and infringes, upon defendant's exclusive rights

under its said trade-mark and trade name, and plaintiff's acts in the manufacture, advertisement, sale and marketing of said product under said name and label, "French Veneer," were wrongful and in violation of defendant's rights; that when defendant endeavored to discover the identity of French Veneer Manufacturing Co., and locate the source of said product, "French Veneer," plaintiff did attempt to avoid discovery and did move her place of business to a new location, and when found and charged with responsibility for using said trade name and label, "French Veneer," denied her identity as French Veneer Manufacturing Co., and disclaimed responsibility for the marketing and selling of said product, "French Veneer," that in truth and in fact plaintiff was at the time of the publication complained of without financial responsibility, and had been theretofore adjudicated, and was then, a bankrupt, and was without financial, or any, credit.

That by reason of the facts aforesaid the publication complained of in the complaint is true.

WHEREFORE, defendant prays that plaintiff take nothing, and that her action be dismissed.

O'CONNOR & DIVET

By A. G. Divet

By J. F. T. O'Connor

STATE OF NEW YORK)
 County of ERIE) SS.
 CITY OF BUFFALO)

Martin J. Cabana being by me first duly sworn, deposes and says; that he is an officer, to wit: the Vice-President of The Liquid Veneer Corporation, a Corporation, the defendant in the foregoing and above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Martin J. Cabana

Subscribed and sworn to before me this 30th day of October, 1933

[Seal]

C. B. McCollum

Notary Public in and for the County of Erie, State of New York.

[Endorsed]: Received Nov. 8, 1933, Pelton, Warne & Balter Attorneys for Plaintiff By Tanner. Filed Nov. 8, 1933. R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

Amendment to Complaint

Leave of court having first been obtained, plaintiff amends her complaint on file herein in the following respects, to-wit:

II

Amending paragraph II thereof to read as follows:

That at all times herein mentioned, LIQUID VENEER CORPORATION was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York and has been and now is doing business in the State of California.

VI

Amending paragraph VI thereof to read as follows:

That for a long time prior to this date, the defendant has continuously and systematically and for the purpose of injuring the reputation and business conducted by this plaintiff, caused letters to be mailed to various customers of this plaintiff for the purpose of destroying the business relations that existed between plaintiff and her customers, and that said letters were written of and about the plaintiff and for the purpose of wilfully and maliciously injuring the good name of the plaintiff and for the further purpose of destroying the business that plaintiff has established in the State of California and elsewhere, and that within one year last past the defendant, in furtherance of its plan and scheme to injure and destroy the

plaintiff's good name and reputation did wilfully and maliciously compose, publish and cause to be published a letter of and about the plaintiff and addressed to Young's Market Company at Los Angeles, California, which letter reads as follows:

"LIQUID VENEER CORPORATION

LONDON, ENGLAND ** BRIDGBURG, CANADA.

Manufacturers of
HOUSEHOLD AUTOMOTIVE SPECIALTIES

- - - - -

Buffalo, N. Y.

U. S. A.

June 2, 1931

Young's Market,
7th Street,
Los Angeles, California.

Gentlemen:— ATTEN. General Manager

Our inspector reports your selling and offering for sale a product called "French Veneer," this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark "Liquid Veneer" as well as our common law rights.

We recently found this product on sale at the May Company. We have explained our position to the May Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Courts as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

We have had more or less difficulty with these people who manufacture this so-called "French Veneer," have tried to purchase evidence against them individually, but they moved around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

It is a different matter, however, where we find a responsible house, like yourselves, handling an infringing product, because at the end of a law suit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit.. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We, therefore, request that you imme-

diately discontinue the sale of this infringing product and advise us to that effect promptly.

The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to someone else, who has spent a fortune in building up their business under that name.

His object for adopting the name "French Veneer" is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing "French Veneer" which she had been using for years. This housewife on finding that she had purchased the wrong Veneer returned it to the May Company and received the proper genuine "Liquid Veneer."

We will await your prompt reply, and remain, meanwhile,

Yours very truly,

LIQUID VENEER CORPORATION

MARTIN J. CABANA

Vice President."

Harry Graham Balter

Attorney for Plaintiff

[Endorsed]: Filed May 9, 1935. R. S. Zimmerman,
Clerk By Francis E. Cross, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

AMENDMENT TO ANSWER OF DEFENDANT
LIQUID VENEER CORPORATION

COME NOW the defendant above named still appearing specially without submitting itself to the jurisdiction of the Court but especially reserving and insisting upon its objection to such jurisdiction as made in its motion and motions to vacate, set aside and quash the pretended service of summons herein, which motion was denied by the Court with the privilege reserved to the defendant of renewing the same at the time of trial and which motion has been so renewed, and especially challenging and denying the jurisdiction of this Court over the defendant and reserving all rights with reference to the jurisdiction of said Court over this defendant, and leave of Court being first had and obtained, files this its amendment to its answer to plaintiff's complaint on file herein, and as a third, separate, further and affirmative defense alleges as follows:

I.

Defendant refers to paragraph II of its further, separate and affirmative defense in mitigation as contained in the original answer on file herein (said defense being the first, separate and affirmative defense pleaded in said original answer) and incorporates each and every allegation in said paragraph II contained in this its third, separate, further and affirmative defense as if herein repleaded and realleged in full.

II.

That at all times herein mentioned, Young's Market was a customer of the defendant and a retail distributor of its product, "Liquid Veneer"; that as such customer and such distributor the said Young's Market was in a trade relation with the defendant above named and was interested in its product. That both of said parties were mutually interested in each other by reason of their business relations in the manufacture, sale and distribution of said "Liquid Veneer"; that the defendant's particular and special interest in relation to Young's Market was of such a nature that if the said Young's Market was engaged in distributing or selling a product which, in the honest belief of defendant, was in fact infringing on their product "Liquid Veneer", that it became the duty of said defendant to notify and call to the attention of said Young's Market its potential liability to the defendant for so doing. Conversely, it was in the interest of said Young's Market, as a distributor of "Liquid Veneer" and as a customer of the said defendant and as a distributor of its product, not to handle another product which, on account of the trade name under which such other product was being sold, was or might be an infringement or in violation of the rights of the said defendant or which might subject said Young's Market to liability and damage as a contributory infringer. That therefore, on account of the mutual business interests and relations existing between said parties, the letter as so written was, became, and remained a privileged communication between the parties;

that there are no officers of said defendant within the State of California and that for that reason affiant makes this verification on behalf of said defendant.

Paul V. Sheehan

Subscribed and sworn to before me this 9th day of May, 1935.

[Seal]

Meredith Koch

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed May 9, 1935. R. S. Zimmerman,
Clerk By Francis E. Cross, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

VERDICT OF THE JURY

We, the jury in the above entitled case, find in favor of the plaintiff, and assess her actual or compensatory damages in the sum of \$11,000.00 dollars (\$.....); and her punitive or exemplary damages in the sum of \$9000.00 dollars (\$.....), making a total of Twenty Thousand dollars, (\$20,000).

Dated: Los Angeles, May 9 1935.
California,

Geo. M. Adair
Foreman of the jury.

[Endorsed]: Filed May 9, 1935, R. S. Zimmerman,
Clerk, By Francis E. Cross, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

JUDGMENT.

On the 7th day of May, 1935, this cause came on for trial before the Court and a jury to be therein duly impanelled; Harry Graham Balter, Esq., and Isador I. Smuckler, Esq., appearing as counsel for the plaintiff, and Paul V. Sheehan, Esq., appearing as counsel for the defendant: thereupon a jury was impanelled and sworn as the jury to try this cause; and evidence, both oral and documentary, having been introduced on said day by respective counsel, and on the following days: May 8th and 9th, 1935; and during the trial of this cause certain motions of respective parties having been denied and/or granted as reflected by the minutes of the Court in this trial; and the testimony being closed, the cause, after argument of respective counsel, and the instructions of the Court, was submitted to the Jury for its consideration and verdict; and on the 9th day of May, 1935, the Jury having returned into the Court-room, and having presented its Verdict, which was read by the Clerk, and is as follows, to-wit:

“IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA. CENTRAL DIVISION. Lena G. Smuckler, Plaintiff Vs. Liquid Veneer Corp., a corp., Defendant No. 5558 C. Law. VERDICT OF THE JURY. We, the jury in the above entitled case,

find in favor of the plaintiff, and assess her actual or compensatory damages in the sum of \$11,000.00 dollars (\$.....); and her punitive or exemplary damages in the sum of \$9000.00 dollars (\$.....), making a total of Twenty Thousand dollars, (\$20,000). Dated: Los Angeles, California May 9, 1935. Geo. M. Adair Foreman of the jury."

and the Court having ordered that said Verdict be filed and entered, and that Judgment be entered accordingly;

NOW, THEREFORE, by virtue of the law and by reason of the premises as aforesaid,

IT IS ORDERED, ADJUDGED and DECREED:

That the Plaintiff, Lena G. Smuckler, doing business as French Veneer Manufacturing Company, do have and recover of and from the Defendant, Liquid Veneer Corporation, a corporation, the sum of Twenty thousand (\$20,000.00) Dollars, together with her, Plaintiff's costs, taxed herein at \$46.42.

JUDGMENT ENTERED AND RECORDED MAY 10th, 1935.

R. S. ZIMMERMAN, Clerk,

By Francis E. Cross,

Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 27th day of September in the year of our Lord one thousand nine hundred and thirty-five

Present:

The Honorable: Geo. Cosgrave, District Judge.

Lena G. Smuckler, doing business)	
as French Veneer Manufacturing)	
Company,	Plaintiff,)	
	vs.	) No. 5558-C-Law.
Liquid Veneer Corporation,)	
	Defendant.)	

This cause having come before the Court on September 9th, 1935, for hearing on Motion of the defendant to set aside verdict and judgment, and for a New Trial, pursuant to Notice filed July 9th, 1935, and argument of counsel thereon having been heard, and said Motion thereupon ordered submitted; the Court, after due consideration, and being now fully advised in the premises, orders said Motion to set aside verdict and for a new trial, denied. Exception to defendant.

[TITLE OF COURT AND CAUSE.]

NOTICE OF FILING AND LODGING BILL OF
EXCEPTIONS, AND NOTICE OF HEARING
ON SETTLEMENT OF THE SAME.

TO LENA G. SMUCKLER, plaintiff above named, and
to her attorneys, HARRY GRAHAM BALTER
AND ISADOR I. SMUCKLER:

YOU WILL PLEASE TAKE NOTICE that the defendant in the above entitled action filed and lodged in the office of the Clerk of the above entitled Court on the 2nd day of December, 1935, its proposed Bill of Exceptions in said case with the view of having the same settled and made a part of the record on appeal; that a copy of said Bill of Exceptions, with a copy of this Notice, is herewith served upon you.

PLEASE TAKE FURTHER NOTICE that the defendant will bring on for settlement his proposed Bill of Exceptions filed herein on the 2nd day of December, and the amendments proposed thereto by you, if any, on the 16th day of December, 1935, at the hour of 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, in the Chambers of the Hon. Geo. Cosgrave, Judge of the above entitled Court in the Federal Building, Temple and Main Streets, in the City of Los Angeles, and District aforesaid.

DATED: This 2nd day of December, 1935.

BICKSLER, PARKE & CATLIN
PAUL V. SHEEHAN,

By W. G. Danielson

Attorneys for defendant.

RECEIPT IS HEREBY ACKNOWLEDGED by Harry Graham Balter and Isador I. Smuckler, attorneys for the plaintiff, Lena G. Smuckler, doing business as FRENCH VENEER MANUFACTURING COMPANY, of a copy of the proposed Bill of Exceptions, and a copy of the Notice of the filing of said Bill of Exceptions and of the hearing on the settlement of said appeal, this 2d day of Dec., 1935.

HARRY GRAHAM BALTER
ISADOR I. SMUCKLER,

By Harry Graham Balter
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 4, 1935, R. S. Zimmerman,
Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on for trial before a jury in the Court presided over by the Hon. Geo. Cosgrave, Judge of the above entitled Court, on the 7th day of May, 1935, and continued through and including the days of May 8th and 9th, 1935, on which latter date it was submitted to the jury and verdict returned awarding plaintiff judgment against defendant in the sum of \$11,000.00 general damages and \$9,000.00 punitive damages, the plaintiff being represented by Harry Graham Balter, Esq., and Isador I. Smuckler, Esq., and the defendant being represented by Paul V. Sheehan, Esq.

Prior to the introduction of any evidence upon the merits of the complaint of plaintiff certain proceedings were had in this cause in the nature of motions, filing of affidavits, evidence in defense of motion to vacate and set aside service of summons and to quash the same, objections, orders and rulings of the Court, etc., and which are as follows, to-wit:

MOTION TO QUASH PRETENDED SERVICE OF SUMMONS ON DEFENDANT.

After order made by the Superior Court of the State of California, in and for the County of Los Angeles, on March 30, 1932, transferring this cause to the United States District Court, and the various papers filed in said Superior Court were certified by the Clerk thereof and filed with the Clerk of this Court on April 25, 1932, the defendant, on May 2, 1932, served and filed its motion to vacate, set aside and quash the pretended service of summons upon the defendant and which motion was sup-

ported by Points and Authorities and is in the following terms, to-wit:

“MOTION TO QUASH

COMES NOW the defendant, Liquid Veneer Corporation, and appearing specially and for the purpose of this motion only, and without in any manner submitting itself to the jurisdiction of the above entitled Honorable Court, moves the said Court to vacate and set aside the alleged and pretended service of summons upon the said defendant, upon the following grounds:

I.

That the said pretended service of summons upon defendant was made on March 1st, 1932, by serving a copy of the complaint and summons upon Frank C. Jordan, Secretary of State of California.

II.

That the said defendant was not on the 1st day of March, 1932, or at any time during the year 1932 or prior thereto, and is not now a resident or citizen of the State of California or of the Southern District of California, Central Division, and was not on the 1st day of March, 1932, or at any other time during said year or at any time prior thereto, and is not now transacting or conducting or carrying on any business within the said State of California or the Southern District of California, Central Division; and that the defendant was not on the said 1st day of March, 1932, or at any other time, and is not now subject to the jurisdiction of the above entitled Honorable Court, or to the jurisdiction of any Court, either State or Federal, within the State of California; that said defendant has not authorized the Secretary of State, nor

any deputy of said Secretary of State, nor any other person within the State of California, to represent it, or to receive service of process or summons for or on its behalf.

III.

That the defendant was not on the 1st day of March, 1932, or at any other time, and is not now, a resident of the State of California or of the Southern District of California, Central Division; nor was said defendant on said 1st day of March, 1932, or at any other time, within the said State of California or the Southern District of California, Central Division, or subject to the jurisdiction of this Honorable Court or of any other Court, or the Superior Court of the State of California in and for the County of Los Angeles, wherein said action was commenced, and has not consented and does not consent to be sued either in said Superior Court of the State of California, County of Los Angeles, or in said Southern District of California, Central Division.

Said motion will be made upon all the files and papers in said cause and upon the affidavits of Martin J. Cabana, Robert V. Jordan and Fred D. Morgan, attached hereto and served and filed herewith.

DATED: Los Angeles, California, April 29th, 1932.

NORMAN S. STERRY,
GIBSON, DUNN & CRUTCHER,
BY Norman S. Sterry

Attorneys for defendant Liquid Veneer Corporation, a corporation, appearing specially and for the purpose of this motion only.

In the opinion of counsel the foregoing motion to quash is well taken and is not interposed for purposes of delay.

Norman S. Sterry."

has been at any time qualified to do business in the State of California.

ROBERT V. JORDAN

Subscribed and sworn to before me this 21st day of April, 1932.

F. G. FRIEBNOW, JR., (SEAL)

Notary Public in and for the County of Sacramento,
State of California.

My Com. Exp. 1/19/33."

"AFFIDAVIT OF MARTIN J. CABANA

STATE OF NEW YORK)
COUNTY OF ERIE) SS
CITY OF BUFFALO)

MARTIN J. CABANA, being duly sworn deposes and says:

That he is a resident of the City of Buffalo, County of Erie, State of New York, is executive vice president of Liquid Veneer Corporation, Defendant above named, and is in charge of sales; that said Defendant is a business Corporation duly organized and existing under and by virtue of the laws of the State of New York with an office and principal place of business in the City of Buffalo, New York; that said Defendant is now and has been at all the times herein mentioned engaged in the manufacture and sale of household and automotive specialties, and that, excepting such business as is transacted in the State of New York and in small part abroad, said business is wholly in interstate commerce.

That said Defendant above named is not now, nor has it ever been at any time, engaged in or been doing business in the State of California, nor has it at any time

maintained an office or place of business anywhere within said State; that it has not now, nor has it ever had any officers, or agents in said State; nor has it at any time ever designated or authorized in the State of California any person, firm or corporation whatsoever to accept service of process upon it or otherwise; that at no time has Defendant above named ever had any officers, agents, person or persons upon whom process could be served residing in the State of California, nor has it ever had at any time any property, either real or personal, within said State, excepting goods "in transit". That at no time has the Defendant Corporation ever filed its Articles of Incorporation with the Secretary of State of the State of California or made any effort to qualify itself to do business within the State of California and that it has never designated or authorized the Secretary of State of the State of California, or one E. C. Mack, or any other person within said State of California to receive or accept notices or summonses or other process for or on behalf of said Corporation.

That E. C. Mack, party to whom Plaintiff herein caused certain papers herein to be mailed in the State of California, is not now, was not on the 1st day of March 1932, nor has he ever been prior to or since said date, an officer or agent of Defendant Corporation above named. That said Mack is a traveling salesman only, having no connection with Defendant other than soliciting orders for its products on a commission basis and that he travels in States other than California, including Washington and Oregon.

That Defendant in the course of its business ships on orders received at the home office its products direct from Buffalo, New York, and makes interstate shipments to

persons, firms or corporations in California and elsewhere on the Pacific Coast who desire to order and purchase its products; that some of said shipments while in transit are at times redistributed by public warehouse forwarders to their points of ultimate destination when previously bulked for freight economy on transcontinental journey.

That all orders from customers, wholesalers, jobbers or retailers, are sent to Defendant at Buffalo, received by Defendant at Buffalo, entered in books at Buffalo, are made up in Buffalo, goods therefor shipped from Buffalo and said orders are obtained almost wholly by a mail order system. That Defendant has been in business about forty years and has had for many years a customer trade which orders by mail; that invoices for goods are sent out from Buffalo by mail with bill of lading and thereafter periodically, that all goods are sold on credit; that only at rare intervals are goods sent C.O.D. with sight draft attached to bill of lading; that customers themselves take or cause to be taken from carriers their shipments of goods on arrival at point of destination in California and elsewhere; that all credits, charges and payments for goods are made at Buffalo, New York and nowhere else and all sales shipments are F.O.B. Buffalo.

That Defendant has never transacted any business within said State of California other than the shipment in interstate commerce of its products into said State and the necessary details in connection therewith.

MARTIN J. CABANA

Subscribed and sworn to before me this 21st day of April, 1932.

C. B. McCOLLUM

Notary Public, Erie County, N. Y."

"AFFIDAVIT OF FRED D. MORGAN

STATE OF NEW YORK)
COUNTY OF ERIE) SS
CITY OF BUFFALO)

FRED D. MORGAN, being duly sworn deposes and says that he is a resident of the City of Buffalo, County of Erie and State of New York, and is an officer to-wit: Secretary and General Manager of Liquid Veneer Corporation, Defendant above named.

That said Defendant is now and was at all the times herein mentioned a Corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and principal place of business at No. 375 Ellicott Street, in said City of Buffalo. That said Corporation is engaged in the manufacture and sale of household and automotive specialties, its principal product for many years being a furniture polish called "Liquid Veneer"; that, excepting such business as is transacted in the State of New York and foreign in small part, the business of Liquid Veneer Corporation is wholly interstate.

That said Corporation has not now nor did it have prior to, since or on March 1st, 1932, the date upon which papers herein were mailed to the Secretary of State of California as deponent is informed, an office or place of business anywhere within the State of California; that it had no officers or agents in the State of California or elsewhere during any of said times mentioned; that it

had no property, either real or personal in said State of California during the times mentioned excepting occasional merchandise in transit; that at no time has the Defendant above named ever designated any person or persons, firm, or corporation upon whom process could be served within the State of California or elsewhere.

That at no time has the Defendant Corporation ever filed its Articles of Incorporation with the Secretary of State of California or made any effort to qualify itself to transact business within the State of California and that it has never designated, appointed, authorized or otherwise empowered, the Secretary of State of the State of California, E. C. Mack or any other person or persons, or any firm or corporation within said State of California to receive or accept notices or summonses or other process for or on behalf of said Corporation.

That at no time has E. C. Mack, person to whom papers herein were mailed on March 1st, 1932, as deponent is informed, ever been an officer, agent, servant or employee of Defendant Corporation, except that he is a traveling salesman soliciting orders for Defendant's products on a commission basis only. That he travels not only in the State of California but also in the State of Oregon, Washington and elsewhere interstate.

That Defendant's business transacted within the State of California is wholly interstate commerce in that all its products are manufactured in Buffalo, sold in Buffalo and shipped from Buffalo to customers in California di-

rect by common carriers; that for purposes of economy at times some goods are bulked in transcontinental freight shipments to one point in said State and thereafter redistributed by public warehouse forwarders to points of their ultimate destination; that almost all orders for goods from customers are received at Buffalo by mail direct from customers themselves, are entered at Buffalo, credited and charged at Buffalo, filled at, and shipped from Buffalo, and collected for and paid for at Buffalo.

That Defendant has never transacted any business within the State of California other than the shipment of goods into said State in interstate commerce and the necessary details in connection with said shipments.

FRED D. MORGAN.

Subscribed and sworn to before me this 21st day of April, 1932.

C. B. McCOLLUM

Notary Public, Erie County, N. Y."

The hearing upon said Motion was duly set for the 9th day of May, 1932, and was thereafter from time to time continued to July 11, 1932.

That prior to the date of said hearing and on or about May 19, 1932, the plaintiff filed the following affidavits in defense of said Motion to vacate, set aside and quash pretended service of summons.

"AFFIDAVIT OF LENA G. SMUCKLER

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

LENA G. SMUCKLER, being duly sworn, deposes and says: That she is the plaintiff in the above entitled action: that the defendant, Liquid Veneer Corporation, maintains a stock of merchandise at the Haslett Warehouse Co., formerly Lawrence Warehouse Company, at the warehouse known as No. 19, located at 285 Brannan Street, San Francisco, California, and also at 37 Drum Street, San Francisco, California; that she has seen orders in the possession of said Lawrence Warehouse Company executed by the defendant herein, Liquid Veneer Corporation, ordering said warehouse company to ship merchandise out of the stock on hand to various concerns in the State of California; that E. C. Mack has called on your affiant enumerable times, as agent for the defendant herein, and has endeavored to adjust differences that have arisen between the parties hereto; that enumerable orders for the merchandise of the defendant herein ordered by concerns in Los Angeles, California, are ordered by the defendant herein to be filled from the above mentioned stock at San Francisco.

LENA G. SMUCKLER

Subscribed and sworn to before me this 17th day of May, 1932.

ELIJAH M. SMUCKLER. (SEAL)

Notary Public in and for said County and State."

"AFFIDAVIT OF ELIJAH M. SMUCKLER

[illegible]

ELIJAH M. SMUCKLER, being duly sworn, deposes and says: That he is the attorney for the plaintiff herein; that he has investigated the fact as to whether or not the defendant herein is doing business in the State of California, and maintains a stock of merchandise in the State of California from which to fill orders from customers in the State of California; that his investigation showed that the defendant herein keeps goods, wares and merchandise stored with a public warehouse in the City of San Francisco known as the Haslett Warehouse Co., formerly the Lawrence Warehouse Company, at its warehouse No. 19, located at 285 Brannan Street, San Francisco, California; that said Haslett Warehouse Co., formerly Lawrence Warehouse Company, is a public warehouse and that said goods, wares and merchandise belonging to the defendant herein are held at said warehouse subject to the order of the defendant herein; that said merchandise is shipped out on orders received by the defendant herein subsequent to the time that said merchandise is placed in said warehouse.

ELIJAH M. SMUCKLER

Subscribed and sworn to before me this 18th day of May, 1932.

SAMUEL DE GROOT

Notary Public in and for said County and State."

On said July 11, 1932, the date of said hearing, the defendant filed the following affidavits in further support of its Motion and in reply to the affidavits of said Lena G. Smuckler and Elijah M. Smuckler.

"AFFIDAVIT OF E. C. MACK

STATE OF OREGON,)
) SS
COUNTY OF KLAMATH,)

E. C. MACK, being first duly sworn, deposes and says:

That he is now and for some time has been a traveling salesman, his territory comprising the Pacific Coast area, which includes the *State* of Washington, Oregon, Nevada, Montana, Idaho and Northern California. That his duties are confined entirely to soliciting, within said territory, orders for the manufactured products of Liquid Veneer Corporation, of the City of Buffalo, State of New York, defendant above named, said orders being forwarded for acceptance by the said corporation at its Home Office in the City of Buffalo. That no sales are or have been made by affiant of any of defendant's goods, wares or merchandise within the State of California, affiant merely soliciting orders for defendants manufactured products, which orders, as aforesaid, are transmitted to defendants at its home office in the City of Buffalo for acceptance.

Affiant states that his compensation is based entirely upon commission on the orders obtained by affiant and accepted by defendant, as aforesaid.

Affiant further states that he has never been authorized to represent the said corporation in any other way or manner or to transact or conduct any business upon its part.

Deponent further states that he never called upon Lena G. Smuckler for the purpose of selling her any goods, wares or merchandise of the defendant corporation; that deponent has never had any conversations with Lena G. Smuckler in any representative capacity or under any authorization of the defendant corporation.

E. C. MACK

Subscribed and sworn to before me this 25th day of June, 1932.

C. R. DeLAP

County Clerk and Clerk of the County Court of Klamath
County Oregon.

By PERRY O. DeLAP, Deputy.

(SEAL)"

"AFFIDAVIT OF FRED D. MORGAN

STATE OF NEW YORK,)
) SS
COUNTY OF ERIE,)

FRED D. MORGAN, being first duly sworn, deposes and says:

That he is the General Manager of Liquid Veneer Corporation, the defendant above named.

That he has read the affidavit of Lena G. Smuckler, the plaintiff herein, filed in opposition to defendant's motion to quash the service of summons upon it. Affiant says that he has, and can have, no personal knowledge as to whether E. C. Mack ever called upon plaintiff as stated in her affidavit, but affiant states positively and of his own

knowledge that said E. C. Mack had no authority at any time to call upon plaintiff for the purpose of adjusting any differences that have arisen between plaintiff and defendant, Liquid Veneer Corporation. Affiant states that, other than this suit, he knows of no differences that have arisen between said parties.

Affiant further states that the said E. C. Mack has been employed by defendant as a traveling salesman, solely upon a commission basis, and solely and only for the purpose of soliciting orders within his territory, which includes the States of Washington, Oregon, Nevada, Montana, Idaho and Northern California, all orders being forwarded to the defendant for acceptance at its Home Office in the City of Buffalo, State of New York, and that the said E. C. Mack had no authority at any time to represent this defendant in any manner, or to transact any business for it or do anything in connection with defendant's business other than as herein stated, viz.: to solicit in his territory, hereinbefore described, orders for the manufactured products of defendant, said orders, as aforesaid, to be forwarded to the Home Office of defendant in Buffalo, New York, for acceptance by said defendant, and that upon any of said orders obtained by the said E. C. Mack being accepted by defendant, defendant filled same by shipment of the goods ordered, from its factory in Buffalo, New York, to the persons, firms or corporations giving the order, either directly to said person, firm or corporation, with bill of lading attached or in care of a warehouse to be delivered to the person, firm or corporation placing the order, upon payment of the invoice for such goods, freight and warehouse charges.

Further deponent saith not.

FRED D. MORGAN

Subscribed and sworn to before me this 20 day of June, 1932.

(SEAL)

C. B. McCOLLUM

Notary Public in and for the County of Erie, State of New York."

On July 11, 1932, said motion was taken under submission for decision by the Court, the parties to file Briefs.

On November 7, 1932, said Hon. Geo. Cosgrave made the following order, to-wit:

"MINUTE ORDER

Motion to quash granted. Exception to plaintiff.

November 7, 1932."

Upon motion made by plaintiff, supported by affidavit of her attorneys, and after notice of hearing thereon, the Court made an order, on December 12, 1932, vacating its ruling quashing the service of summons and granting leave to plaintiff to file Brief in ten days thereafter and granting defendant ten days thereafter to file Reply Brief.

On December 22, 1932, the plaintiff filed the original Summons issued by the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, at the time this action was filed in said Court, on the 17th day of December, 1931, and also filed attached thereto a Certificate of the Secretary of State of the State of California, reading as follows:

"STATE OF CALIFORNIA
DEPARTMENT OF STATE.

STATE OF CALIFORNIA,)
) SS
DEPARTMENT OF STATE,)

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify.

That on the 1st day of March, 1932, duplicate copies of the Complaint and Summons, in the case of LENA G. SMUCKLER, vs LIQUID VENEER CORPORATION, were served upon me, as Secretary of State, which copies were accompanied by the fee of \$5.00 prescribed by Section 406a of the Civil Code of the State of California, and the statement required by said Section of the address of the defendant corporation, to-wit; Buffalo, New York, and also the address of the Pacific Coast Representative, E. C. Mack, 1890 Grove Stret, San Francisco, California.

I further certify that on the 2nd day of March, 1932, I advised the defendant corporation at the addresses above stated, by prepaid telegram, of the fact of the service upon me of duplicate copies of said Complaint and Summons, and that on said date I deposited in the United States Post Office, at Sacramento, California, a sealed envelop addressed, as above, with postage thereon fully prepaid, including postage for the transmission of said envelopes by registered mail, and that said envelopes each contained a copy of said Complaint and Summons.

I further certify that the records of this office do not contain the name of said defendant corporation, or show the location of its offices.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California, to be hereto affixed this 2nd day of March, 1932.

FRANK C. JORDAN, Secretary
of State.

(Great Seal of	By Robert V. Jordan,
State of California)	Assistant Secretary of
	State."

While said Motion to Quash was under submission with the Court and on May 1, 1933, hearing was had on motion of plaintiff to re-open hearing on motion by defendant to quash service of Summons and to permit plaintiff to present testimony of Miss. E. Kaster, Mr. W. E. Max and Mr. E. C. Mack, and the Court orders said motion granted and sets the hearing for May 13, 1933.

On May 13, 1933, the following proceedings took place on the hearing to permit oral testimony on the part of plaintiff in opposition to defendant's motion to quash. Prior to the taking of any evidence the attorneys for defendant stated to the Court:

DIVET: If the Court please, the defendant appearing at this hearing continues to appear specially under the reservation of the special appearance that was made upon the original motion.

THE COURT: Yes.



(Testimony of Robert H. Breckenridge)

ROBERT H. BRECKENRIDGE,

called as witness for the plaintiff, was being duly sworn. After stating his name counsel for the defendant objected to the testimony of the witness on the ground that he was not within the motion or the order reopening proceedings of the motion to quash and that said motion was made to present the testimony of witnesses, Miss E. Kaster, Mr. W. E. Max, and Mr. E. C. Mack. The Court overruled the objection and exception was taken. The witness then testified as follows:

I am the Assistant Controller for the May Company, located at Eighth and Broadway, Los Angeles. I am in charge of the records of both receivables and payables and have with me certain records of the May Company relating to transactions with the Liquid Veneer Corporation. These records are a part of the files of the May Company and under my control and management. This invoice of date of July 7, 1932, was mailed to us from the Liquid Veneer Corporation, of Buffalo, New York, and we received the merchandise billed on the invoice direct from Buffalo.

A photostatic copy of the invoice was admitted as plaintiff's Exhibit 1.

(Photostat.)

Subsequently I received an invoice as to the balance of the merchandise from Buffalo, New York, and received the balance of the merchandise from San Francisco. This invoice is dated July 18, 1932.

(Testimony of Robert H. Breckenridge)

A photostatic copy of said invoice was offered as evidence and the following objection was made by the defendant.

DIVET: I wish to interpose the objection that there was no proper foundation laid and that the document as offered and the recitals thereon are purely hearsay.

THE COURT: And the objection is overruled. Exception to the defendant.

The document was admitted as plaintiff's Exhibit 2.

(Photostat)

I hand you freight bill, dated July 15, 1932, under which we received the merchandise.

The document was admitted as plaintiff's Exhibit 3.

(Photostat)

I have here an invoice of the Liquid Veneer Corporation, dated April 13, 1932, received by mail from Buffalo, New York. All the merchandise invoiced thereon was received by us from Buffalo, New York.

Photostatic copy admitted as plaintiff's Exhibit 4.

(Photostat)

I have here an invoice dated April 18, 1932, which was mailed from Buffalo, New York. The merchandise we received from San Francisco.

SMUCKLER

16
LIQUID VENEER
pitr exhibit
No. 25
Filed May 9, 1933
R. S. Zimmerman, Clerk
By Cross

No. 5508-C
SMUCKLER
VS
LIQUID VENEER
pitr exhibit
No. 8
Filed May 13, 1933
R. S. Zimmerman, Clerk
By Cross



THE MAY CO
Deputy Clerk

FREIGHT BILL
1390 EAST 7TH ST., LOS ANGELES

7/15/32 IRC

Freight Bill No. 99 12063

To PACIFIC ELECTRIC RAILWAY COMPANY, Dr., for charges on articles transported:

WAYBILLED FROM

WAYBILL DATE AND NO.

FULL NAME OF SHIPPER

CAR INITIALS AND NO.

SF 7/12/32 2155

LAWRENCE WHSE FOR LIQ VENEER CORP

POINT OF ORIGIN OF SHIPMENT OR COMMERCIAL LINE REFERENCE

PREVIOUS WAYBILL REFERENCE

ORIGINAL CAR INITIALS AND NO.

PSS ADM HASTEAD 51

NUMBER OF PACKAGES, ARTICLES AND MARKS

WEIGHT

RATE

WEIGHT

ADVANCES

PREPAID

20 CTNS MOPS

10 BOLS WOP HANDLES W/O ATTS

2 BX FURNITURE POLISH IN GLS 85

1 CTN DO

4 CTN LIQ WAX

204

70

125

80

1 33

40

1 60

16 52

02 TOLLS

65 JUL 14 79

PAID ELECTRIC RAILWAY CO
LATER JUL 15 1932
U. S. W. MAIL ROOM

TOTAL TO COLLECT

3 27

3 77

LOCATION

Subject to STORAGE OR DEMURAGE CHARGES FOR DELAY IN DELIVERY

The original paid freight bill must be surrendered to the carrier for refund of charges.

T.F.R.

3 77

3 77

This Company appreciates suggestions from the public which may be helpful in improving the usefulness of the Company's organization to the public may be increased.

Vice President & General Manager, Pacific Electric Railway, Los Angeles, California.

DATE DATE 1/20/17

Maushold and Associates Specialties
375 Elliott Street
Buffalo, New York

30. DOCK-
SANDOLLER
V8
LIQUID VASELIN
PIC Exhibit
No. 8
Filed May 10, 1938
M. B. Zimmerman, Clerk
By Cross,

Sold by THE MAY COMPANY
LOS ANGELES, CALIF

SHIP TO
157

✓
N/A HASLETT WHSE- PACIFIC SS CO-
FRT. PREPAID

INVOICE DATE

FEB 17 1943

TERMS—CASH—30 Days Net - 5% CASH DISCOUNT

[illegible][illegible]**TOTAL OF THIS INVOICE**

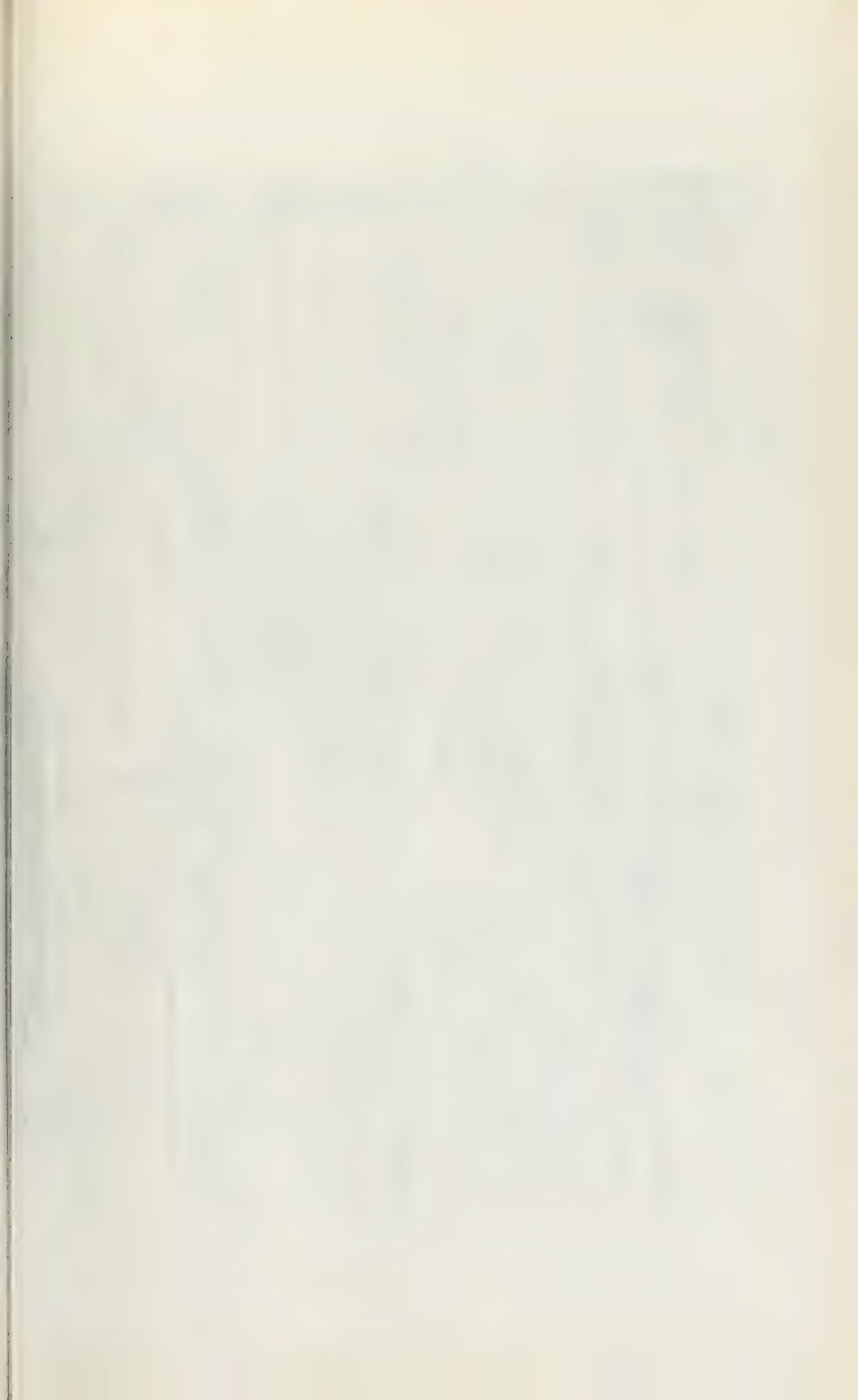
三

D 1220

INVOICE

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

[illegible]



LIQUID VENEER CORPORATION

United and Atlantic States

575 Market Street
San Francisco, New York

NO. 5556-C
SHUTTER
LIQUID VENEER
PAT. 2,150,000
Filed May 15, 1935
R. S. Zimmerman, Clerk
By Gross Deputy Clerk

THE MAT CO.,
LOS ANGELES, CALIF

SHIP TO
137
VIA HAWLEY WSC- PACIFIC 88 CO-
FRT PREPAID

Sold to
INVOICE DATE
FEB 16 1935
TERMS CASH - 30 Days Net - 2% 10TH PROX

92148
29
171.36
28.6
3-16

ORDER DIVISION
TERMS 2-10
1.0.8
2-23
2-23

INVOICE OFFICE
DATE 2-23
3-16

Quantity	DESCRIPTION	DATE	PRICE	AMOUNT
DOZ.	4 OZ. LIQUID VENEER			
DOZ.	18 OZ. LIQUID VENEER			
DOZ.	3 1/2 OZ. TUBES EATON			
DOZ.	4 OZ. TUBES NEVZELAK TIRE FLUID			
DOZ.	1 OZ. CAN PIRCO RADIATOR CLEANER			
DOZ.	1 OZ. CAN RADIATOR NEVZELAK			
1 GROSS	L.V. DEPARTMENT STORE SPECIAL			
	NO. 5556-C SHUTTER LIQUID VENEER PAT. 2,150,000 Filed May 15, 1935 R. S. Zimmerman, Clerk By Gross Deputy Clerk			
	SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CALIF			

Paid
FEB 24 1935

D 1382
TOTAL OF THIS INVOICE
122.40

INVOICE

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

ORDER NO. 11244 DATE 1/15/35 ORDER NO. 11244 FROM CO. 11244 INVOICE NO. 1382

This Company is always open to suggestions from the public which may be helpful in improving the service. The management welcomes, in particular, reports of unsatisfactory and courteous treatment received at the hands of our employees so that by commending such acts the usefulness of the Company's organization to the public may be increased.

Vice President & General Manager, Pacific Electric Building, Los Angeles, California.

1-31-100M



No. 5599-C
SMOGLER
VS
LIQUID VENEER
PLIF EXHIBIT
No 6
Filed May 8, 1935
R. S. Zimmerman, Clerk
By Cross
Deputy Clerk

THE MAY CO

1200 EAST 7TH ST., LOS ANGELES

R. S. Zimmerman Clerk

No. 5599-C
SMOGLER
VS
LIQUID VENEER
PLIF EXHIBIT
No. 6
Filed May 15, 1935
By Cross
Deputy Clerk

4/18/32

DEPT. NO.

35 7443

TO PACIFIC ELECTRIC RAILWAY COMPANY, Dr., for charges on articles transported:

U.S.

WAYBILLED FROM
S F CALIF

4/15/32

1290

LAWRENCE WISE CO A/C LIQUID VENEER

157

POINT AND DATE OF SHIPMENT

CONNECTING LINE REFERENCE

PREVIOUS WAYBILL REFERENCE

NUMBER OF PACKAGES, ARTICLES AND MARKS

WEIGHT

RATE

FREIGHT

ADVANCE

2 BX LIQ MAX FLOOR IN TIN 58
3 CTN DO DO 30
3 BOLS MOP HANDLES LESS AIT 21

88

65

59

6 CTN MOPS

65

59

26-53160
T 6910

RICHARDS

S/S

LOCATION

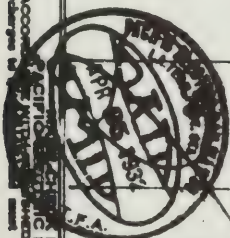
SUBJECT TO STORAGE OR DEMURRAGE CHARGES IN ACCORDANCE WITH THE TARIFFS OF THE PACIFIC ELECTRIC RAILWAY COMPANY

THE ORIGINAL PAID FREIGHT BILL MUST BE SUBMITTED FOR CREDITS

PAID FOR

128 719

TOTAL TO COLLECT



Buffalo, New York

Household and Automotive Specialties

No. 5586-C
 BROOKLYN
 VS
 LI-UID VEMER
 Pltf Exhibit
 No. 5
 filed May 13, 1935
 R. S. Zimmerman, Clerk
 By Cross

LOS ANGELES, CALIF.

137
VIA P S S CO- PREPAID

INVOICE DATE

10 12

TERMS—CASH, Less 2% in 10 Days—30 Days Net

[illegible][illegible]

C16430

INVOICE

TOTAL OF THIS INVOICE

79.36

(Testimony of Robert H. Breckenridge)

Photostatic copy of invoice admitted as plaintiff's Exhibit 5.

(Photostat)

I have here freight bill dated April 15, 1932, covering this merchandise.

Admitted as plaintiff's Exhibit 6.

(Photostat)

I have here invoice dated February 16, 1933, received from Buffalo, New York. The merchandise was received from San Francisco.

Admitted as plaintiff's Exhibit 7.

(Photostat)

I have here invoice dated February 17, 1933, received from Buffalo, New York. The merchandise described therein was received from San Francisco.

Photostatic copy admitted as plaintiff's Exhibit 8.

(Photostat)

To sum it up all of the invoices were received from Buffalo, New York, and some of the goods filling the invoices were received from Buffalo and some from San Francisco.

(Testimony of Karl S. Nance)

I made no search of our records in back of the dates of these documents and do not know whether there are any similar invoices older than the oldest date of these invoices. May Company has been dealing with the Liquid Veneer Corporation for a matter of about 5 or 8 years. There has been no change in the general method of transacting business with Liquid Veneer Corporation on the part of the May Company.

KARL S. NANCE,

called as witness on behalf of plaintiff was duly sworn and before he testified objection was made by defendant to his testimony on the ground that he was not one of the witnesses named in the motion for order re-opening proceedings to quash. The objection was overruled and witness testified as follows:

I am assistant in the Auditing Department of Young's Market Company, located in Los Angeles, and I have with me two invoices from the files of the Company from the Liquid Veneer Corporation. This invoice dated April 30, 1930, was received from the Liquid Veneer Corporation, at Buffalo, New York. The merchandise described therein was received from the warehouse at San Francisco, on May 1, 1930.

Photostatic copy of invoice and record of date of receipt of merchandise was admitted as plaintiff's Exhibit 9.

(Photostat)

Young's Market Co., Inc.

Name *James J. Vance*
 Address *Buffalo, N.Y.*
 Apt. No. *128*
 Date *4/30/1930*

128 Liquid Veneer 40%
60 Liquid Veneer 12%
1 Dozen Quarts Liquid Veneer
None
703 Destination
432
432

No. 8456-C
 INSPECTOR
 LIQUID VENEER
 Pile Exhibit
 No. 9
 Filed May 13, 1930
 By *W. J. Zimmerman*, Clerk
 Deputy Clerk

375-377 ELLICOTT STREET

LIQUID VENEER CORPORATION

BUFFALO, N. Y.

C 385

1 - 7

DATE *Apr 30 1930*

B 8004

SOLD TO: YOUNGS MARKET CO.
 1610 WEST SEVENTH ST.
 LOS ANGELES, CALIF.

SHIPPED TO:

VIA: P S S CO- FRT. ALLOWED

DATE SOLD	ORDER ENTERED	CUSTOMER'S ORDER	SALESMAN	CLASS	TERMS
4/15/30	4/25/30	9100		1-1-2	30 DAYS NET 2% 10 DAYS

QUANTITY	DESCRIPTION	PRICE	EXTENSION	TOTAL
✓ 12	DOZEN 4 OZ. LIQUID VENEER	3.60	43.20	
✓ 6	DOZEN 12 OZ. LIQUID VENEER	7.20	43.20	
✓ 1	DOZEN QUARTS LIQUID VENEER	15.00	15.00	
	LESS 33-1/3 AND 20%		101.40	
			33.80	
			67.60	
			13.52	
			54.08	
			108	
			3300	
			250	
			5056	

SHIPPED FROM WAREHOUSE AT SAN FRANCISCO, CALIF.

APR 6 1930

HOUSEHOLD DEPARTMENT

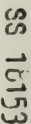
PAID

MAY 13 1930

OUR ACCOUNTS ARE FINANCED BY THE AMERICAN CREDIT-FIDELITY CO.

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 10 DAYS FROM RECEIPT OF GOODS

INVOICE



CAR INSTALLS AND HOW

TRADE MARK

PAID

For 18

TOTAL TO COLLECT

by CROSS
Demetri C]ork

This Company appreciates suggestions from the public which may be helpful in improving the service. The management welcomes, in particular, reports of unusually satisfactory and courteous treatment received at the hands of our employees so that by commending such acts the usefulness of the Company's organization to the public may be increased.

Vice President & General Manager Pacific Electric Building, Los Angeles, California.

The Company aims to serve the public pleasantly and well. Officers and employees are working together to this, and the failure of one is a reflection upon all. Our customers will render a service by calling attention to delinquency. Address General Superintendent, Pacific Electric Building, Los Angeles, California.
The original paid freight bill must be surrendered for overcharges. No refund must accompany claims for overcharge, loss, or damage.



FREIGHT BILL
1200 EAST 7TH ST., LOS ANGELES

YOUNGS MKT CO

1610 W 7TH STREET

5/1/30 VEYL

25 57954

TO PACIFIC ELECTRIC RAILWAY COMPANY, Dr., for charges on articles transported:

WAYBILLED FROM

WAYBILL DATE AND NO.

PULL NAME OF SHIPPER

CAR ARTICLES AND NO.

No 5558-C
SMUCKLER

VS
LIQUID VENEER

Pltf Exhibit

No. 11

Filed May 12, 1935

R.S. Zimmerman, Clerk

By Cross

Deputy Clerk

SHIPMENT AND DATE OF SHIPMENT
PSS SEP 26 189

4/28/30 4602 LAW WINE CO FOR LIQ VENEER CONC (see invoice)

NUMBER OF PACKAGES, ARTICLES AND MARKS

WEIGHT

RATE

FREIGHT

ADVANCES

TOTAL

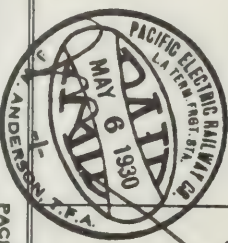
2 CTNS LIQ VENEER
1 CS DDO
1 CRT DO

124
135
52

80

2 49

01 TOTAL



LOCATION

MAKE CHECK PAYABLE TO
PACIFIC ELECTRIC RY. CO. FOR

TOTAL TO OBLIGATE

BEECHING'S STYS OR DEMURRAGE CHARGES IN ACCORDANCE WITH PUBLISHED TARIFFS.

2 50

No. 5558-C
SMUCKLER
VS
LIQUID VENEER
Pltf Exhibit
No. 11
Filed May 9, 1935
R.S. Zimmerman Clerk
By Cross
Deputy Clerk

Young's Market Co., Inc.

Date 3/17/31 1931

Name Liquid Veneer Co.

Address

Apk. No.

8 Cts 12 1/2 oz Liquid Veneer

4 Cts 12 1/4 oz "

2 Cts 12 1/2 oz "

Memo

1101
1004

No. 8586-C

LIQUID VENEER

Pltr Rabbit

Filed May 18, 1935

By Cross Deputy Clerk

No. 8586-C

LIQUID VENEER

Pltr Rabbit

Filed May 18, 1935

By Cross Deputy Clerk

Form 100

375-377 ELLICOTT STREET

LIQUID VENEER CORPORATION

BUFFALO, N. Y.

C1690

DATE

MAR 20 1931

B48875

SOLD

TO:

YOUNG'S MARKET CO.
1630 WEST SEVENTH ST.
LOS ANGELES, CALIF.

137

SHIPPED TO:

VIA:

P S S CO- FRT. ALLOWED

DATE SOLD

ORDER ENTERED

CUSTOMER'S ORDER

SALESMAN

CLASS

TERMS

30 DAYS NET ~~25~~ 10 DAYS

3/7/31

3/12/31

4354

2M

C8

QUANTITY

DESCRIPTION

PRICE

EXTENSION

TOTAL

✓ 4
✓ 8
✓ 2

DOZEN 4 OZ. LIQUID VENEER
DOZEN 12 OZ. LIQUID VENEER
DOZEN QUARTS LIQUID VENEER

@ PER DOZEN
@ PER DOZEN
@ PER DOZEN

1.92
3.84
8.00

7.68
30.72
16.00

54.40
109
53.31

SHIPPED FROM WAREHOUSE AT SAN FRANCISCO, CALIF. MAR 14 1931

HOUSEHOLD DEPARTMENT

2 PER CENT DISCOUNT IF PAID BY
MAR 30 1931

PAID
MAR 20 1931

Young's Market Co., Inc.

Volume No. 29527

The 2% we give you for paying cash 20 days before this bill is due amounts to a return of 36% on the money you loaned to clean up this account. Don't lose your money!

INVOICE

(Testimony of Karl S. Nance)

This invoice dated March 20, 1931, was received from Liquid Veneer Corporation, in Buffalo, New York, and the merchandise was shipped from the warehouse in San Francisco, and received here on March 17, 1931.

Photostatic copy of invoice and record of receipt of merchandise was admitted as plaintiff's Exhibit 10.

(Photostat)

This photostatic copy of a freight bill dated May 1, 1930, is a copy of the freight bill we received at the time we received the shipment under the 1930 order.

Photostatic copy of freight bill admitted as plaintiff's Exhibit 11.

(Photostat)

This photostatic copy of freight bill, dated March 14, 1931, covers the merchandise received on our invoice on the 1931 order.

Photostatic copy of freight bill, dated March 14, 1931, admitted as plaintiff's Exhibit 12.

(Photostat)

On cross-examination he testified as follows:

All I know about the shipment of this merchandise from a warehouse in San Francisco is what I learned from an examination of the freight bills and other documents. I do not know whether there was a warehouse there at the time the merchandise was shipped.

(Testimony of Miss Emma M. Kaster)

MISS EMMA M. KASTER

called as witness for plaintiff was sworn and testified as follows:

I am a demonstrator and saleslady employed by the Liquid Veneer Corporation, of Buffalo, New York, at the May Company. I demonstrate and sell Liquid Veneer merchandise and May Company merchandise, and derive my compensation solely from the Liquid Veneer Corporation. It is in the form of a check sent through the mail to my home. I work under the supervision of Mr. Max, buyer for The May Company, and Mr. Gallivan, of the Liquid Veneer Corporation, who is in Buffalo, New York. I know E. C. Mack, an employee of Liquid Veneer Corporation, as he hired me. I do not know his address. All I know is that he is connected with the Liquid Veneer, I believe as District Manager. When he comes into the store I have no conversation with him with respect to my duties as demonstrator. Our talk is along a business line of, "How is business?" "Selling much?" Just ordinary business conversation takes place. I do not know that he has his headquarters in San Francisco. That is his home. I am paid a straight salary, and commissions if I sell a certain amount, but I have not been selling that much so I do not get any commissions. When we run short of merchandise at the May Company I go to Mr. Max and ask him for an order and the girls in the office write it up. Goods are received as I need it. I do not know where it comes from. I have been at the May Company for 12 years. I first started working for the Liquid Veneer Corporation 7 or 8 years ago. Its products handled in the May Company are dust mops, furniture polish, liquid wax, fly spray and moth spray, general household merchandise.

(Testimony of Miss Emma M. Kaster)

On

CROSS-EXAMINATION

she testified:

As demonstrator I show a customer merchandise and explain it to her, try to sell it to her and show her other merchandise if there is anything she is interested in buying and showing how it is used. For that I am paid by the Liquid Veneer Corporation. The merchandise that I sell is May Company merchandise. I do not confine my sales of May Company merchandise to Liquid Veneer Corporation products but sell other merchandise as well from its stock of goods. I do not know from where the products are purchased but assume from the Company producing it. So far as I know Liquid Veneer products are sold to the May Company just as any other property in the store is sold. Though I sell products of the May Company it doesn't pay me for these sales as that is the policy amongst demonstrators. I am merely a representative of the Liquid Veneer Corporation. We are to help out the customer and show her their merchandise so we can sell our merchandise. There are about twenty of us demonstrators showing different lines. The idea consists of showing customers how to use these products and to try to interest them so as to sell our merchandise with the merchandise of the May Company. I do not work under Mr. Mack and receive no orders from him. I give him whatever information I can when he asks me for it. The goods I sell are out of the May Company stock of goods. Mr. Max is the buyer for the May Company while Mr. Mack is the representative of the Liquid Veneer Corporation, and lives in San Francisco.

(Testimony of Mrs. Lena G. Smuckler)

MRS. LENA G. SMUCKLER

was called for witness, was sworn, and after stating her name the defendant objected to the taking of her testimony on the ground that her affidavit was already on file and that she is not among the witnesses for whose testimony the hearing was opened up. The objection was overruled and she testified as follows:

I manufacture French Veneer Polish. In the year 1932 I had occasion to go to a warehouse in San Francisco, the Lawrence Warehouse, down by the water front. I do not quite remember the address. I do not remember the date I was there. It was in the early part of 1932. I would judge it was the latter part of January or the early part of February. There I saw merchandise marked with the name "Liquid Veneer" and bills there were made out to concerns that they were shipping out to in California. I had been a demonstrator in the May Company and the carton in which the merchandise of the Liquid Veneer Corporation is brought up to the demonstrating floor was similar in character to the cartons I saw in the warehouse. I had a conversation with the bookkeeper at the warehouse.

Defendant objected to the conversation as being "immaterial, incompetent and purely hearsay." Colloquy between respective counsel and the Court took place, counsel for defendant stating:

MR. DIVET: This bookkeeper in the one or the other of these warehouses may be possessed of very important and material information, but in order that that important and material information may be gotten over to this Court, this man must be put upon oath; it cannot be

(Testimony of Mrs. Lena G. Smuckler)

gotten over by someone telling what that man told her. This witness testified that she talked with this bookkeeper and counsel is asking her to detail what that man told her. If that is not within the hearsay rule, then I do not understand the rule.

THE COURT: That may be true, but it reasonably appears in the case that the merchandise was shipped from a place in San Francisco, and it appears also that it came from this place that is being described by the witness. The witness states that the bills were sent out from this place and that the company's product was there. If the company's product was in charge of somebody there I would assume that was with the company's permission. That would be a fair assumption, of course. We are not trying the case, of course. We are merely trying to get at, as a preliminary hearing, just what the capacity of the company is in California, what the company is doing in California. I think the evidence may safely be admitted. Overruled.

THE WITNESS TESTIFIED: I asked him if they kept Liquid Veneer there and he said they did; and I asked him "could customers come there and purchase Liquid Veneer and have it shipped to them?", and he said "Yes, they can." He said, "They have agents here to take orders and ship it direct from this warehouse.", and "Mr. Mack, himself, brought all his orders to have them shipped." I asked him, "Could I purchase Liquid

(Testimony of Mrs. Lena G. Smuckler)

Veneer from you here and have it shipped to my address?"

He said, "You certainly can."

MR. DIVET: I move to strike out that testimony upon the ground it now appears to be purely and entirely hearsay, a recital of statements from one on which no foundation is laid.

THE COURT: That remains to be found out. I will reserve ruling on that point. Proceed.

There was no further examination by counsel. Upon

EXAMINATION

by the Court she testified:

I was in the warehouse perhaps an hour—and saw a big room full of Liquid Veneer. I did not go through the whole warehouse. He took me into this door and in back of this place was all Liquid Veneer. The room was not as large as the size of this court room, it was smaller, although it was a great big room. It was about one-half the size of this court room and all filled with Liquid Veneer. It was packed in boxes, paper cartons marked "Liquid Veneer." It had more floors but I only went into this particular place. I was only in this one room. I just wanted to see if they had merchandise there, that was all I wanted.

Q: You described the position of this man's desk?

A: Yes.

Q: Where was it?

(Testimony of Mrs. Lena G. Smuckler)

A: Well, it was similar to this. You come up two or three steps, and then you come in there, a sort of cage—you know how they have cages, sort of wire, and then there is an opening, and I spoke to him through this, and right up here (indicating) was a door that led back into this place.

Q: Into the room that you have described?

A: Yes. When I was talking to him he showed how they made out their bills, what their bills was, and told me what quantities I could buy. I talked as if I wanted to buy merchandise from him.

Q: He showed you bills?

A. Yes, of the Liquid Veneer people, the way they make them out to their customers.

Q: Well, did you see any purchases made there?

A: At the time I was there?

Q: Yes.

A: No, I did not. I did not see anybody in there buying at the time. All I saw was that he was making out bills to ship out.

Q: What else did this man do?

A: That was all that he was doing. You see he was sort of a bookkeeper and shipping clerk combined.

Q: Did he ship for anybody other than the Liquid Veneer?

A: Well, I don't know, because I did not ask him. You see, I was not interested in anybody else.

(Testimony of Mrs. Lena G. Smuckler)

On

CROSS-EXAMINATION

the WITNESS TESTIFIED:

"I did not learn the name of the man. - - - I asked him if I could purchase some Liquid Veneer in there and he wanted to know who I was and I told him I was a party who wanted to go into business and wanted to know whether I could purchase from Liquid Veneer Corporation so I could keep it on hand and I asked him how they made out their bills - - - and he brought out some bills that were all typed out and were going out with the merchandise." I did not ask him his name at that time although I was there for the purpose of getting information with regards to this case.

Q: Yet you did not take pains enough to inquire what the man's name was that was giving you this valuable information?

A: Well, I did ask him if he was just a new man or if he had been there a long time. He said he had been there a long time. Coming in as I did I did not feel I wanted to ask too many questions or let him know who I was. I don't believe I can describe the kind of looking man he was. He wasn't real young, I would say about in his late thirties. I do not remember whether or not he wore glasses. He was smaller than the gentleman sitting here but I don't know if he was quite as tall. This little wicket that he was back of was located right next to this room that had the Liquid Veneer in it. There was a door opening from the right near his wicket into the room where the Liquid Veneer stock was kept. My best recollection of the time is not that it was in January or

(Testimony of Mrs. Lena G. Smuckler)

February 1931 or 1932, - - - it was either in 1930 or 1931. I just don't remember. I could look it up, I didn't think to look it up.

Q: 1930 or 1931?

A: Yes. I *caon't* tell you - - I couldn't say to that. I wouldn't want to say because I just don't remember.

Q: You were at that time engaged in gathering information as to whether they were doing business in California or not?

A: Yes, sir.

Q: Well, the question of their doing business in California had not arisen at that time, had it?

A: Yes, sir.

Q: Your action was not brought until March 1932, was it?

A: Well, I was gathering information for it, however, because they had been bothering my sales; they had been bothering my customers, my sales.

I was not anticipating that the defendant would say it was not doing business in the State. I was not anticipating anything. When I would put on a demonstration they would write threatening letters to my customers and have me put out of business because they said I was using the word "Veneer". This had been going on for many years. In 1930 or 1931 they claimed they were not doing business here. I have given you as good a description of the man as I can. I did not find out who the man was, so I don't know his name.

The hearing was thereupon continued to May 29, 1933, at which time the defendant filed the following affidavits.

“AFFIDAVIT OF THOMAS B. HEALY

UNITED STATES OF AMERICA,)
STATE OF NEW YORK, (SS
COUNTY OF ERIE, (

THOMAS B. HEALY, being duly sworn, deposes and says that he is an officer of the Liquid Veneer Corporation, the defendant above named, and is familiar with the methods used by said corporation in the shipment of its merchandise to various parts of the United States and that deponent is also familiar with the freight rates in connection with said shipments whether by rail or water; that it is part of deponent's duties to figure freight costs and charges on merchandise shipped in interstate business by defendant above named and to devise and select the most economical forms of transportation.

That in shipping merchandise from Buffalo, New York, to the West Coast of the United States it is at times necessary for purposes of economy to ship said merchandise in car load lots, have same deposited at a central point such as a public warehouse in San Francisco and then have said shipments broken up and reshipped and redistributed to plaintiff's customers at various points on the West Coast; that said merchandise so shipped is always in transit.

That if merchandise is shipped by freight overland across the United States in less than car load lots the freight rate is \$3.45 per hundred pounds; that if said merchandise is shipped in full car load lots by rail from Buffalo to New York City and then by boat to San Fran-

cisco the combined freight rate both by rail and water amounts to \$1.15 per hundred pounds and a saving of \$2.30 per said one hundred pounds. As an example of the economy effected by said methods the last car load shipment of customers orders sent by defendant to the West Coast weighed approximately thirty-six thousand pounds and a saving to defendant above named of \$828.00 when shipped by rail and water as against the cost if same had been shipped in less than car load lots overland to the West Coast of the United States. The methods used by defendant above named in shipping merchandise on long hauls is to ship it in car load lots, route it to a central point such as a public warehouse in San Francisco for redistribution to customers and then have the shipment broken up and redistributed; that this is the only practical method to insure both economy and service and is the usual and most economical method employed by all business houses engaged in interstate commerce.

When a customer's order is reshipped and redistributed from a public warehouse to a customer it is ordinarily freight billed from the warehouse. The above method is used by defendant above named in the reshipment of its merchandise and is the common and ordinary practice in interstate commerce.

Deponent has read the substance of that part of Mrs. Smuckler's oral testimony in which she states she saw merchandise of the defendant in a warehouse in San Francisco. Deponent states on his own knowledge and experience that said testimony is untrue in that no person would be permitted without authority from the shipper and on proper identification to have access to a shipper's goods or to inspect same in any public warehouse in California or anywhere else. Deponent further states that

defendant above named never carried a permanent warehouse stock in California, never employed any person in any warehouse in charge of its merchandise and never had any employee at any warehouse authorized to receive or accept orders. That all of the business of defendant is transacted from the City of Buffalo, New York.

(Signed) THOMAS B. HEALY

Subscribed and sworn to before me this 26th day of May 1933.

C. B. McCOLLUM

Notary Public, Erie County, N. Y."

"AFFIDAVIT OF MARTIN J. CABANA

STATE OF NEW YORK)
COUNTY OF ERIE) SS

MARTIN J. CABANA, being duly sworn, deposes and says: That he is the Vice-President in charge of sales of the Liquid Veneer Corporation, Defendant above named, and has been connected with said business for upwards of thirty years.

That deponent has read the substance of the oral testimony given by Lena G. Smuckler, the plaintiff herein, on the hearing of the motion to quash the service of the summons served on the defendant by mail in this action; that said Lena G. Smuckler stated in said testimony that in 1930 or 1931 she visited a warehouse in San Francisco and found there a room which was practically full of Liquid Veneer Corporation's products, that same were packed in cartons the same as those she had seen in the May Company in Los Angeles; that there was an unidentified man

in said warehouse who professed to be in charge of the Liquid Veneer Corporation's business and that she asked said man if Liquid Veneer Corporation would ship goods from San Francisco to her at Los Angeles and that the said unidentified man assured her that a stock of goods was kept on hand at San Francisco and that orders could be filled from there by mail and that the goods would be delivered direct to customers.

Deponent states on his own knowledge that said testimony of Lena G. Smuckler, the plaintiff herein, is not true in that Liquid Veneer Corporation has never at any time employed a man in San Francisco or any place else in the State of California in charge of its business or its merchandise; that defendant's method of doing business is, and was at all times herein mentioned, to ship and bill all orders for merchandise to customers in California direct from Buffalo; that all orders for merchandise from customers in California had to be received, approved of and paid for in Buffalo; that occasionally for the purposes of saving freight rates a car load shipment of merchandise would be sent to a central point in California such as a warehouse in the City of San Francisco for redistribution from said point to various customers in different parts of California and in sending an order for goods part of said order might be reshipped by freight from said warehouse to its ultimate destination; that at no time did defendant above named ever carry a permanent stock of goods in any warehouse in the State of California nor did defendant ever have any representative or employee in charge of any stock in any warehouse; that defendant has never owned any property in the State of California, has never been licensed to do business in said State and has never had any employees in said State excepting a

demonstrator and a traveling salesman on a commission basis; that defendant has never had any one in said State designated to receive legal process, has never had any one present at any warehouse in the State of California representing the Company and clothed with any authority to do such things as the plaintiff herein has testified were done by the unidentified person to whom she referred.

That the May Company and Youngs Market in the City of Los Angeles have been customers of the defendant with an established line of credit; that when said customers ordered merchandise from defendant same would be shipped direct from Buffalo and occasionally the whole or part of the order might be filled by routing merchandise through a public warehouse in order to economize on freight charges from Buffalo; that it is more economical to send a car load lot of goods to a warehouse in California from the City of Buffalo and have same redistributed from said point to customers in California than it is to ship each order individually direct from Buffalo to customers in California as the frequent shipment of small orders is expensive on long hauls and therefore over a long period of time it would happen occasionally that part of an order might be shipped to a customer from a warehouse out of a car load lot of goods but only in the way of redistribution from a central point; that at no time were any goods of defendant ever shipped initially from any point other than from the City of Buffalo nor ordered or paid for by customers to any other point than said City; that all orders have to come to Buffalo and all shipments be made from Buffalo excepting that occasionally as aforesaid a car load lot of merchandise might be routed through a warehouse by the defendant in order to save on freight rates; that at no time could a customer

in California order goods otherwise than through the home office of the Company at the City of Buffalo.

That outside of its home State of New York defendant does a strictly interstate commerce business in the United States of America and as a general business policy has no branches, agents, stocks of goods or property of any kind, real or personal, in any State of the Union other than the State of New York; that all its business is carried on at Buffalo, New York, all orders filled, approved of and paid for at said City and all goods shipped from its factory in Buffalo direct to customers and not otherwise excepting as aforesaid.

(Signed) MARTIN J. CABANA

Subscribed and sworn to before me this 25th day of May 1933.

(Seal of Notary)

THOMAS B. HEALY"

On October 7th, 1933 the Court made the following order:

"MINUTE ORDER

COSGRAVE, District Judge.

The oral evidence taken is sufficient, being uncontradicted, to show that the defendant was doing business in California.

Motion to quash is denied with right to defendant to renew the same at the trial. Exception to defendant.

October 7, 1933."

On May 7, 1935, the date of the trial, after the jury was impaneled and sworn and retired from the Court room, before an opening statement or any evidence, the defendant renewed its motion to quash the service of the summons on the ground that the Court had no jurisdiction of the defendant, and filed the following renewed motion and affidavits.

"Comes now the defendant, Liquid Veneer Corporation, appearing specially for the purpose of this motion only, and without in any manner submitting itself to the jurisdiction of the above entitled court, over the person of the defendant, but questioning and denying such jurisdiction, and pursuant to the Order of the Court made herein on October 7, 1933, renews its original motion, now on file herein, to vacate and set aside the alleged and pretended service of summons upon the defendant, and moves the court to vacate and set aside such alleged and pretended service of summons upon defendant upon the following grounds:

(1) That the said pretended service of summons upon defendant was made on or about March 1st, 1932, by mailing a copy of the complaint and summons to the Secretary of State of the State of California, and as defendant is informed and believes mailing a copy thereof to one, E. C. Mack, at San Francisco, California.

(2) That the said defendant was not on the 1st day of March, 1932, or at any time during the year 1932 or prior thereto, and is not now a resident or citizen of the State of California, or of the Southern District of Cali-

fornia, Central Division; and was not on the 1st day of March, 1932, or at any other time during said year, or at any time prior thereto, and is not know transacting or conducting or carrying on any business within the said State of California or the Southern District of California, Central Division; and that the defendant was not on the said 1st day of March, 1932, or at any other time, and is not now subject to the jurisdiction of the above entitled Honorable Court, or to the jurisdiction of any court, either State or Federal, within the State of California; that said defendant has not authorized the Secretary of State, nor any deputy of said Secretary of State, nor any other person within the State of California to represent it, or to receive service of process or summons for or on its behalf.

(3) That the defendant was not on the 1st day of March, 1932, or at any other time, and is not now, a resident of the State of California, or the Southern District of California, Central Division; nor was said defendant on said 1st day of March, 1932, or at any other time, within the said State of California, or the Southern District of California, Central Division or subject to the jurisdiction of this Honorable Court or of any other court, or the Superior Court of the State of California in and for the County of Los Angeles, wherein said action was commenced, and has not consented and does not consent to be sued either in said Superior Court of the State of California, County of Los Angeles, or in said Southern District of California, Central Division.

(4) That neither the Secretary of State of the State of California, or said E. C. Mack were agents or officers of defendant, or in any way authorized or empowered by defendant to receive or accept service of summons or other process, or to be the subject or object of service of such process upon them or either of them, at the time of such pretended service or at any time.

Said motion will be made, renewed and based upon the summons and complaint, as now on file in this cause, the original motion and notice of motion to quash, vacate or set aside the service of summons, as now on file therein, and the following affidavits used in support of the motion as originally made, and now on file herein, to-wit:

1. Affidavit of Robert V. Jordan of date April 21, 1932.

2. Affidavit of Fred D. Morgan of date April 21, 1932.

3. Affidavit of Martin J. Cabana of date April 21, 1932.

4. Affidavit of Fred D. Morgan of date June 20, 1932.

5. Affidavit of E. C. Mack of date June 25, 1932.

6. Affidavit of Thomas B. Healy of date May 26, 1933.

7. Affidavit of Martin J. Cabana of date May 25, 1933.

Also the following records now on file, To-Wit:

1. Order granting motion to quash, of date November 7, 1932.

2. Order vacating the last mentioned order.

3. Order of date October 7, 1933, denying motion to quash, and permitting the renewal of the motion.

Also the following affidavits hereto attached and served and filed herewith, to-wit:

1. Affidavit of John Brash, of date February 1, 1934.

2. Affidavit of George Savage of date February 1, 1934.

3. Affidavit of J. W. Howell of date February 1, 1934.

4. Affidavit of W. G. Heise of date February 1, 1934.

5. Affidavit of Edison C. Loyd of date February 1, 1934.

6. Affidavit of Martin J. Cabana of date August 10th, 1934.

7. Affidavit of Martin J. Cabana of date, 1934

8. Affidavit of of date....., 1934."

"AFFIDAVIT OF JOHN BRASH

COUNTY OF SAN FRANCISCO)
STATE OF CALIFORNIA) SS

JOHN BRASH, being first duly sworn upon his oath deposes and says:

That he is, and for more than ten years last past he has been superintendent of a warehouse now operated by the Haslett Warehouse Company situated at the corner of Second and Brannan Streets in San Francisco, California, now known as Humboldt Warehouse of the Haslett Warehouse Company, and which up to January 1st, 1932 was known as "Lawrence Warehouse 19." That the entrance to said warehouse is at 285 Brannan Street and he has been in charge of the business conducted therein.

That as superintendent of said warehouse it has at all times been a part of his duty and business to know, and he has known, of the customers and/or patrons of said warehouse and of the manner and way in which the goods of customers and/or patrons thereof were handled and kept. That the business of said Haslett Warehouse Company and the business conducted in said warehouse now known as the Humboldt Warehouse consisted of a general storage business of merchandise and various articles that might be tendered to it for storage and included the receipt of goods in bulk shipments of carload lots, or lots by water routes from various parts of the United States beyond the boundaries of the State of California, and the taking of such goods and merchandise into said warehouse for the purpose of breaking up such bulk shipments and distributing them to customers of the shippers according to directions furnished by the shippers and for the pur-

pose of receiving such shipments of goods the trains of the different railroad companies connected with a spur railroad track extending into said warehouse, where cars were received and unloaded.

That said warehouse known as the Humboldt was up to January 1st, 1932 one of several warehouses owned and operated by a company known as the Lawrence Warehouse Company, and was known as "Lawrence Warehouse 19", and on said date the warehouses and business of said Lawrence Company were taken over by the Haslett Warehouse Company and thereafter said warehouse became known as the Humboldt Warehouse of said Haslett Company. That upon the taking over of such warehouses and business by the Haslett Company affiant went from the employ of the Lawrence Company into the employ of the Haslett Company and has continued without interruption to be superintendent of said warehouse, and has at all times exercised and possessed the same authority and been charged with and performed the same duties as under his employment by the Lawrence Company, and the business of the warehouse has been conducted in the same manner and to a large extent with the same employees and patrons under both ownerships.

That while affiant was superintendent of said Humboldt Warehouse prior to January 1st, 1932, Mr. Edison C. Lloyd (commonly known as Ed Lloyd) was general superintendent of warehouses of the Lawrence Company, including said Humboldt Warehouse.

That affiant knows, and at all times herein mentioned he has known, of the business concern, Liquid Veneer Corporation of Buffalo, New York, defendant above named, and during all the time of his employment as superin-

tendent as aforesaid, said Liquid Veneer Corporation has been a patron or customer of said Humboldt warehouse and it has been a part of affiant's duty to know and he has and does know in detail how the business with said Liquid Veneer Corporation has been conducted, and how shipments of goods coming from it to either the Lawrence Company or the Haslett Company have been handled, and he states that such business has been conducted and handled as follows:

(1) During all of the time hereinbefore mentioned all goods consigned to and received by Lawrence Warehouse Company, or Haslett Warehouse Company, from Liquid Veneer Corporation have been consigned and received from Buffalo, New York, and have in all instances been received at and taken into, and until disposed of as hereinafter explained, kept in said identical warehouse now known as the Humboldt Warehouse of the Haslett Company, and they did not go into any other of the warehouses of either of said companies.

(2) That there was, at all times, an arrangement and custom between the Lawrence Warehouse Company and Liquid Veneer Corp. (which upon the Haslett Company taking over the business of the Lawrence Company were adopted and acted upon by the Haslett Company) to the effect that Liquid Veneer Corporation would ship its products into said Humboldt Warehouse in carload or other bulk shipments to be broken up and reshipped from the warehouse to customers of Liquid Veneer Corporation in California, and neighboring states to fill orders received by Liquid Veneer Corporation from its customers as the warehouse management should be directed by Liquid Veneer Corporation to make such shipments.

(3) Referring now to all the time of affiant's connection with the operation of the warehouse called Humboldt warehouse, under the control of both the Lawrence and the Haslett Companies, aforesaid, affiant further says:

That from time to time and at varying intervals Liquid Veneer Corporation would consign car-load or car-loads of its product to whichever of the two companies was at the time operating, the said warehouse now known as Humboldt, and would notify said warehouse of such consignment.

(4) That upon the receipt of a bulk shipment of goods from Liquid Veneer Corporation they would be unloaded into said warehouse and segregated from other goods until reshipped as hereinafter stated.

(5) That in connection with the consignment and receipt of such goods the warehouse company would receive by mail from Liquid Veneer Corporation at Buffalo, New York, instructions to break up such bulk shipment and re-ship certain articles and quantities, as itemized in the instructions, to various customers of Liquid Veneer Corporation throughout California and adjoining states. That it sometimes happened that the orders for reshipment received in immediate connection with such shipments were not sufficient to exhaust the bulk shipments then under consideration and that additional instructions would shortly follow and there were occasions when a shipment would not be entirely exhausted by the accompanying orders to reship, which fact would be made to appear to Liquid Veneer Corporation by comparison of their records of the bulk shipments with the warehouse's report of reshipments made, and in regular course additional shipping instructions would be given.

(6) That upon receipt of a bulk shipment of goods, as aforesaid, and directions to distribute the same, as aforesaid, the warehouse force would unload said goods, if they had not already been unloaded, and in either case would segregate them from the goods of others in said warehouse, and from the mass of such goods would fill the shipping directions given by Liquid Veneer Corporation, as aforesaid, and any goods left over after filling such directions would be held until the receipt of further directions for their disposition, as aforesaid.

(7) That in disposing of bulk shipments of goods of Liquid Veneer Corporation, as aforesaid, neither the warehouse or its employees had anything to do with the sale of the same, or with the invoicing of them to the parties to whom they were shipped, and they knew nothing about the sale, the price, the terms of sale or the value of the goods but simply broke the bulk shipment and reshipped it to designated parties in designated amounts, and made out no papers except the ordinary shipping bill or bill of lading, and neither affiant or anyone engaged in the warehouse ever had instructions or permission to sell any of the goods so shipped to them and they were never given or informed of the sales price of such goods, and they were never billed or invoiced out of the warehouse or by the warehouse company and they never did or could quote prices and never sought to or did sell, or assume to sell any of such goods, and they were in no way authorized to represent or act for Liquid Veneer Corporation except in making such shipments, as aforesaid, and were never given authority to or requested to make any representations or statements of any kind concerning the sale of the goods of the Liquid Veneer Corporation, and if any employee of said ware-

house ever made any statements concerning the manner of disposition of the goods of said Liquid Veneer Corporation, or represented that they could be purchased at said warehouse, he was without authority to do so, and was in error for neither the Lawrence or the Hazlett Warehouse Company ever sold or had authority to sell any of such goods, or had information as to the prices at which they were sold or to be sold.

Affiant further says that there has been exhibited and read to him a transcript of the testimony of the plaintiff in this action, Mrs. Smuckler, to the effect in substance that at sometime between the first part of 1930 and the early part of 1932 she visited a warehouse which she called the Lawrence Warehouse, near the water front and in the warehouse district, in San Francisco, and that in that warehouse she conversed with a man occupying a clerical position, such as bookkeeper or billing clerk, in an office back of a wicket; that he stated to her the manner in which Liquid Veneer products were sold; that they could be there obtained from a stock of goods kept on hand and that he exhibited to her bills and invoices and showed her a large stock of Liquid Veneer products kept in a room into which a door opened adjacent to such office and explained that orders taken for such goods would be filled from such stock. That affiant cannot and does not pretend to remember the testimony so read to him with accuracy or in detail, but without regard to what said witness may have testified he states the following facts in addition to all that has been heretofore stated, to-wit:

The warehouse before referred to as the Humboldt warehouse is situated in what is referred to as the water front and warehouse district of San Francisco.

That the entrance to said warehouse building used by persons entering the same is on Brannan Street and one entering comes almost immediately to the warehouse office, which is on the street floor and is separated from the rest of the floor by a high counter surmounted by a wicket through which business with the office is transacted, and that has been the situation during all the times herein mentioned.

That there is no room, and for more than five years past there has been none, on said first floor adjacent to the office into which a door opened from the part of the building occupied by the office and entrance to the building. That a part of the building back of, and the full width of said office has for more than such five year period been partitioned off with no entrance thereto from that part of the building, and no goods of Liquid Veneer Corporation have ever been kept or placed in said room. That for more than five years last past all goods of Liquid Veneer Corporation when received in said warehouse have been immediately segregated from other goods in the warehouse by putting them in the basement of the building, where they have been broken up for reshipment as hereinbefore stated, and to get to the part of the basement into which said goods have been put and kept during said five year period it is necessary to go the width of said building on Brannan Street around the end of the railroad track, extending into the building, thence back the length of the building to a basement stairs and thence down to the basement floor.

That since long prior to the year 1930 the regular clerical force of said warehouse has consisted of one W. G. Heiss, who has been in general charge of the clerical work, and different lady stenographers and since before

the year 1930 said Heiss has been absent from his work not more than a few weeks in all. That when for any reason said Heiss has been absent from the office his place has been taken by one George Savage, and no one but the said Heiss, said Savage and said lady stenographers has since before 1930 been at any time in charge of said office or at work therein and except that at times affiant may have done some of his work therein, and in that behalf affiant says that no occurrence of a woman appearing and seeking information in regard to Liquid Veneer products has taken place, at any time when he was present in the office.

That all other employees than those mentioned who have worked in said warehouse since long before the year 1930 have been engaged in different lines of manual work and none of them have been in charge of, or worked in the office, or had access to the papers therein at any time.

Affiant further says that the warehouse business as at all times conducted by the Lawrence and Haslett Companies (and such business generally in the city of San Francisco) is a confidential business in which it is not ethical or proper to disclose the business of patrons, and that said companies and their employees would not more disclose the names of storers of goods or the extent of their holdings than bank employees would disclose the names of depositors or the extent of their deposits, and that it would have been against all the rules and practices of either of said warehouse companies for an employee to disclose the relations between a patron and said warehouse, or the fact or extent of the storage of goods by any patron, and no employee of either of said companies was ever authorized or permitted by said companies, or

either of them, to make any statements or admissions on behalf of Liquid Veneer Corporation, or any other patron.

Affiant further says that it is his recollection of the testimony of said woman (Mrs. Smuckler) that the goods of Liquid Veneer Corporation which were shown to her were sufficient in quantity to fill a room half the size of the court-room in which she was giving her evidence. That the largest amount of goods of Liquid Veneer Corporation in said warehouse even immediately upon the unloading of the largest shipment ever made to said warehouse would not fill the half of any court-room affiant ever saw, and it would only be upon unloading of one of the largest shipments and before the distribution thereof to customers that goods would be present in quantities large enough to prompt such extravagant statements.

Affiant further says that the Lawrence and Haslett Warehouse Companies were paid by Liquid Veneer Corporation not upon a commission basis or with reference to the sale of any goods but only as warehousemen and such compensation was based upon the number of cubic feet occupied and for the time occupied by the goods while awaiting billing out to different persons by direction of Liquid Veneer Corporation; the labor of handling in and out and the labor, if any, of repacking where that was necessary.

JOHN BRASH
JOHN BRASH

Subscribed and sworn to before me this 1st day of
February, 1934

VIOLET NEURNBURG
Notary Public in and for the County of San Francisco,
State of California."

“AFFIDAVIT OF GEORGE SAVAGE

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) SS

GEORGE SAVAGE being first duly sworn upon his oath deposes and says:

That for several years prior to 1930 and up to the 1st of January, 1932, he was in the employ of the Lawrence Warehouse Company and since that date has been in the employ of the Haslett Warehouse Company, working in both said employments in a warehouse at the corner of Second and Brannan Streets in San Francisco, known first as “Lawrence Warehouse 19” and later as “Humboldt” warehouse of the Haslett Company.

That a part of his work in said warehouse was that of conducting the office and doing the work of the regular office manager W. G. Heiss in the absence of said Heiss from his work and on all occasions when said Heiss was absent affiant did assume his place. That during each year 1930 and 1931 affiant did relieve said Heiss during his vacation period for about two weeks in each year, and perhaps on some other short periods, and he had likewise relieved him during prior years and no one else took over the work of said Heiss during any of his absences.

That in connection with his work in the office during the absence of Mr. Heiss he became very familiar with the manner of handling the business of Liquid Veneer Corporation in said office and he has read the affidavit of said W. G. Heiss in this case and states the fact to be that said affidavit correctly states the facts with relation thereto as he would state them in detail, if called upon to do so.

Affiant further says that there has been exhibited and read to him what purported to be a transcript of the testimony of Mrs. Smuckler, the plaintiff in this action, concerning an interview with a man in the office of a warehouse referred to as the "Lawrence Warehouse" to the general effect that some time between the first part of the year 1930 and the early part of the year 1932 she visited a warehouse which she called the Lawrence Warehouse, near the water front and in the warehouse district in San Francisco; and that in that warehouse she conversed with a man occupying a clerical position, such as book-keeper or billing clerk, in an office back of a wicket; that he stated to her the manner in which Liquid Veneer products were sold; that they could be there obtained from a stock of goods kept on hand and that he exhibited to her bills and invoices and showed her a large stock of Liquid Veneer products kept in a room into which a door opened adjacent to such office and explained that orders taken for such goods would be filled from such stock. That affiant cannot and does not pretend to remember the testimony so read to him with accuracy or in detail, but without regard to what said witness may have testified he states the following facts in addition to all that has been heretofore stated, to-wit:

The warehouse before referred to as the Humboldt warehouse is situated in what is referred to as the waterfront and warehouse district of San Francisco.

That the entrance to said warehouse building used by persons entering the same is on Brannan Street and one entering comes almost immediately to the warehouse office, which is on the street floor and is separated from the rest of the floor by a high counter surmounted by a

wicket through which business with the office is transacted, and that has been the situation during all the times herein mentioned.

That there is no room, and for more than five years past there has been none, on said first floor adjacent to the office into which a door opened from the part of the building occupied by the office and entrance to the building. That for more than five years past all goods of the Liquid Veneer Corporation when received in said warehouse have been immediately segregated from other goods in the warehouse by putting them in hte basement of the building where they have been broken up for reshipment in accordance with orders and directions of the Liquid Veneer Corporation and to get to the part of the basement where said goods have been kept during said five years last, starting from the office, it is necessary to go the width of said building on Brannan Street, around the end of the railroad track, extending into the building, thence back the length of the building to basement stairs and thence down to the basement floor.

That at no time while affiant was in charge of or present at the said office did any woman appear and make inquiry in regard to the products of the Liquid Veneer Corporation, and no stock or goods of the said Liquid Veneer Corporation, were ever exhibited to any woman, and that if any such thing had occurred affiant would have remembered the same because it would have been distinctly out of the ordinary in that by the rules and practices of the warehouse nothing in regard to the business

of patrons is ever disclosed but the same is deemed to be and is considered confidential and if any person had made any request for information in regard to the goods or business of the Liquid Veneer Corporation, affiant would either of his own responsibility have refused to give the same or would have referred the inquiry to Superintendent John Brash. That during all the time of affiant's employment with either the Lawrence Warehouse Company or the Haslett Warehouse Company such matters have been considered and treated as confidential.

That if at any time there were sufficient goods of the Liquid Veneer Corporation on hand in the said warehouse to fill a room as large as a freight car it would have been immediately after receipt of a car-load shipment and before the operation of reshipment had been accomplished; that it is affiant's recollection of the reading of the testimony of plaintiff that she stated that the goods of Liquid Veneer Corporation were present and exhibited to her in quantities sufficient to fill a room one-half the size of the courtroom in which she was testifying.

Further affiant sayeth not.

GEORGE W. SAVAGE
GEORGE SAVAGE

Subscribed and sworn to before me this 1st day of February, 1934.

VIOLET NEURNBURG
Notary Public in and for said County and State."

“AFFIDAVIT OF J. W. HOWELL

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) SS.

J. W. HOWELL, being first duly sworn upon his oath deposes and says:

That he is and for years last past has been the secretary of the Haslett Warehouse Company doing business as a warehouseman in the City of San Francisco. That on the 1st day of January 1932, the Haslett Warehouse Company took over the warehouses and business of the Lawrence Warehouse Company, that up to that time had been doing a similar warehouse business in San Francisco, taking over among other things the business and possession of a warehouse at the corner of Brannan and Second Street in said city, up to that time known as “Lawrence Warehouse 19” now known and designated as “Humboldt” warehouse of the Haslett Company.

That at the time the Haslett Company took over said warehouse John (Jack) Brash was the superintendent in charge, W. G. Heiss was in charge of the office and the clerical work and records and George Savage was employed in various Capacities and as a substitute for Mr. Heiss in case of his absence from the office. That said named persons were continued in their several capacities as employees of the Haslett Warehouse Company and have ever since maintained their respective positions.

That one of the patrons of said warehouse before its acquirement by the Haslett Company was Liquid Veneer Corporation of Buffalo, New York, and it has continued as a patron to this time and the course of business existing between it and the Lawrence Warehouse Company has been continued and followed and all consignments of

goods by Liquid Veneer Corporation to either said Lawrence Company or the Haslett Company have gone into and been handled through said identical warehouse known now as the "Humboldt" and the details of the handling of such goods are better known to said Brash, Heiss and Savage than to affiant, who has no connection with the Lawrence Warehouse Company and its transactions prior to January 1st, 1932.

That affiant has been for many years actively connected with the warehousing business such as conducted by the Lawrence and the Haslett Companies and knows the character of such business, and the relationship between such warehousemen and patrons during all of the said time and in that behalf he states the fact to be that such business in the City of San Francisco is a confidential business in which it is, and has been, considered unethical and improper for warehousemen to disclose for whom they are storing or shipping goods as such information would expose owner of goods to the danger of attachments or other process and in the case of making reshipments would disclose to competitors the customer lists of patrons; and employees of such storage companies are universally forbidden to give out any information concerning patrons or their affairs very much as bank employees are restrained from disclosing the accounts of customers.

Further affiant *saety* not.

J. W. HOWELL

J. W. HOWELL

Subscribed and sworn to before me this 1st day of February, 1934

VIOLET NEURNBURG

Notary Public in and for said County and State."

HEISE W.G.H.
 "AFFIDAVIT OF W. G. ~~HEISS~~ U.N.N.P.

COUNTY OF SAN FRANCISCO)
 STATE OF CALIFORNIA) SS

HEISE W.G.H.

W. G. ~~HEISS~~, being first duly sworn deposes and says:

Heise W.G.H.

That he is the identical W. G. ~~Heiss~~ U.N.N.P. mentioned in the affidavit of John Brash taken in this case.

three W.G.H. U.N.N.P.

That for about ~~five~~ years immediately preceding January 1st, 1932 he was in the employ of the Lawrence Warehouse Company and from January 1, 1932 to the present time he has been in the employ of the Haslett Warehouse Company both of San Francisco, California. That for many years prior to January 1st, 1932 the Lawrence Warehouse Company was engaged in a general warehousing and storage business in San Francisco, and among others it conducted a warehouse at the corner of Second and Brannan Streets in said city known as "Lawrence Warehouse 19." That on January 1st, 1932 the business and warehouses of said Lawrence Company were taken over by the Haslett Warehouse Company which continued the business of the Lawrence Company and from shortly after that time the said warehouse Lawrence 19 was designated and known as the "Humboldt" warehouse of the Haslett Company. That upon the succession of the Haslett Company to the business of the Lawrence Company, the employees at said warehouse, Lawrence 19, were continued as employees of the Haslett Company, including - - - John (Jack) Brash, George Savage and affiant and the business of said warehouse

continued with the same patrons and customers. That prior to such change of ownership and control one Edison C. Lloyd was general superintendent of warehouses but under the new ownership and control J. W. Howell succeeded to the duties of said Lloyd but his offices are not in the warehouse but in the executive offices of the Haslett Warehouse Company, he being its secretary.

That during all the time of his employment by said two companies he has been in charge of the office and office work of said warehouse now called the Humboldt, which has at all times been located on the street floor of the building and reached from without the building through a street entrance at No. 285 Brannan Street. That he had no definite title but his work consisted of the general conduct of the office business with the assistance of various lady stenographers, and of keeping the office records and performing, or having performed, the duties ordinarily performed by a billing clerk and he has been at all times familiar with both the general course of business conducted through said warehouse and the details thereof as far as involved in the records, papers and correspondence. That during occasional brief absences of affiant from his work in said office his work has been taken over and performed by George Savage and during all the course of said employment of affiant in said warehouse no other employee than himself, said Savage and stenographers as mentioned have been engaged in or worked about said office except that on occasions the superintendent, John Brash, might be engaged in some of his work therein and except that after July 1st, 1932 one Mr. Mullins might have assisted in office work.

That during all the time of his employment in said warehouse Liquid Veneer Corporation has been a customer or patron of said warehouse now known as "Humboldt" and the warehouse business transacted by it has gone through his hands and he has personal knowledge of what such business consisted of and how it was conducted and in that regard he states:

Relating to the entire period of his employment, as aforesaid, affiant states: That from time to time Liquid Veneer Corporation would consign to the warehouse now known as "Humbolt" carload or other bulk shipments of its products from Buffalo, New York. That under an arrangement and custom ante dating affiant's employment Liquid Veneer Corporation would in connection with making such a bulk assignment to the warehouse furnish to the warehouse separate directions to the effect that the goods so consigned should be distributed in smaller lots to various customers, the precise articles and amounts to be shipped to each customer being specified in the separate direction as to that customer. That many such directions would generally be mailed and received together and such a group of directions might arrive at the warehouse preceding, concurrently with or shortly following the actual receipt of the goods according to the time occupied in transit.

That upon receipt of a consignment of goods if shipped by rail the car containing them would be switched into the warehouse over a spur extending into it and be unloaded and for about five years last past all goods of Liquid Veneer Corporation have been when unloaded segregated from all other goods and placed in the warehouse basement for reshipment under directions from Liquid Veneer Corporation.

That upon the unloading and segregation of a shipment of goods the warehouse force would proceed to break up the shipment by selecting thereupon the articles and amounts necessary to comply with the several directions then on hand or would await the receipt of expected directions if they had not yet arrived.

That as the articles necessary to comply with shipping directions were selected and set aside for shipment to various parties affiant would proceed in due course to make out, or cause to be made out appropriate shipping or way bills designating the consignee as per instructions and naming the warehouse company as consignor.

That it would sometimes happen that the shipping directions received by the warehouse in connection with a particular shipment would not exactly correspond with the contents of a bulk shipment which would appear to Liquid Veneer Corporation by a comparison of their schedules of shipments with copies of the shipping bills always furnished by affiant to Liquid Veneer Corporation when reshipments were made as per instructions and in the regular course of things if there was any excess, further shipping instructions would be given by Liquid Veneer Corporation, and the remaining goods shipped out. If it should happen that there was a deficiency in goods to fulfill all shipping directions on hand the regular course would be to await another shipment and they comply.

That in making reshipments of goods as above specified the warehouse would not, and it did not furnish, or make

out invoices or bills to the consignees for the goods, and the persons conducting the operation as aforesaid were not furnished any price list and did not know the prices at which any goods were sold or the terms upon which they were received by customers of Liquid Veneer Corporation, and they had nothing to do with the sale of such goods and had no interest in the sale thereof, and had no authority to make sales, but acted as warehousemen only and were compensated upon the basis of the amount of space taken up by the goods while in the warehouse, according to the time they were there and the amount of labor involved in handling, etc.

Affiant further says that there has been exhibited and read to him what purports to be a transcript of the testimony of the plaintiff in this action, Mrs. Smuckler, to the effect in substance that at some time during the years 1930 or 1931, or the early part of 1932, she visited a warehouse, which she called the Lawrence Warehouse, near the water front and in the warehouse district, in San Francisco, and that in that warehouse she conversed with a man occupying a clerical position, such as bookkeeper or billing clerk, he being in an office back of a wicket; that he stated to her the manner in which Liquid Veneer Products were sold; that they could be there obtained from a stock of goods kept on hand and that he exhibited to her bills and invoices and showed her a large stock of Liquid Veneer products kept in a room into which a door opened adjacent to such office and explained that orders taken for such goods would be filled from such

stock. That affiant cannot and does not pretend to remember the testimony so read to him with accuracy or in detail, but without regard to what the said witness may have testified he states the following facts in addition to all that has been heretofore stated, to-wit:

The warehouse hereinbefore referred to as the Humboldt Warehouse is situated in what is referred to as the water front and warehouse district of San Francisco.

That the entrance to said warehouse building used by persons entering the same is on Brannan Street and one entering comes almost immediately to the warehouse office, which is on the street floor and is separated from the rest of the floor by a high counter surmounted by a wicket through which business with the office is transacted, and that has been the situation during all the times herein mentioned.

That there is no room, and for more than five years past there has been none, on said first floor adjacent to the office into which a door opened from the part of the building occupied by the office and entrance to the building. That a part of the building back of, and the full width of said office has for more than such five year period been partitioned off with no entrance thereto from that part of the building, and no goods of Liquid Veneer Corporation have ever been kept or placed in said room. That for more than five years last past all goods of Liquid Veneer Corporation when received in said warehouse have been immediately segregated from other goods in the warehouse by putting them in the basement of the building,

where they have been broken up for reshipment as hereinbefore stated, and to get to the part of the basement into which said goods have been put and kept during said five year period it is necessary to traverse the said building on Brannan Street around the end of the railroad track, extending into the building, thence back the length of the building to a basement stairs and thence down to the basement floor.

That the only times affiant was absent from the performance of his duties since the beginning of the year 1930 were two weeks of vacation in said year and two weeks in the year 1931, and that during the year 1932 he was not absent at all; that during the period of his absence his place was taken, and the office was in charge of George Savage, hereinbefore mentioned.

Affiant further says that at no time during his employment and while he was in charge of the said office did Mrs. Smuckler, or any other woman appear and have any conversation with him in regard to the manner in which the goods of Liquid Veneer Corporation were kept or concerning the subject of their being for sale, or concerning whether they could be bought and delivered from a stock on hand in the said warehouse, or in any way concerning and relating to the goods of the Liquid Veneer Corporation, or how they were handled and kept in said warehouse, and never at any time did he exhibit or show to any woman bills or invoices or other papers concerning the shipments and handling of goods of the Liquid Veneer Corporation in the said warehouse, and that at no time

during the handling of said goods have way bills or invoices of goods of the Liquid Veneer Corporation shipped from the warehouse been made out and been present in the office of said warehouse and never at any time did he show the said Mrs. Smuckler, or any woman, around the store houses and point out to her or in any way exhibit to her goods belonging to or bearing the brand of Liquid Veneer Corporation, and he never made any statements to any woman of the kind or character said to have been testified to by Mrs. Smuckler as having been made by the man she found in charge of the office of the warehouse she visited.

That if any such occurrence as that referred to in the preceding paragraph had ever taken place affiant could not help but remember and he would have remembered it because it would have been so out of the ordinary and out of accord with the practices of said warehouse; that the warehouse business as conducted between said Liquid Veneer Corporation and the Lawrence and Haslett Warehouse Company is treated and conducted as a confidential business and it is against the rules and practices of the warehouse to disclose in any way to any person the names of, or any facts in regard to people having goods there on store and it has been a well-known and universal practice among all employees of said warehouse to preserve such business relations as confidential.

Affiant further says that it would be impossible for anyone to see in the said office invoices or bills or any other documents or papers made out in connection with the re-

shipment of goods because no such papers were ever present therein, and the only papers ever made out in said office concerning the shipment of goods were the way bills or shipping bills and they were universally made out on a printed form filled in with pen and ink.

Affiant further says that it is his recollection of the testimony of the witness referred to that the goods of the Liquid Veneer Corporation which were shown to her were sufficient in quantity to fill a room half the size of the court-room in which she was giving her evidence. With reference to that, affiant further says that the only times at which a large amount of goods sufficient to fill a freight car, for example, were present in the said warehouse would be at times immediately after the unloading of a carload shipment and before the same had been distributed by re-shipment, and there has never been present at one time in the said warehouse goods sufficient to half fill a large room such as the witness described as being one-half the size of a court room.

W. G. HEISE

Subscribed and sworn to before me this 1st day of
February, 1934

VIOLET NEURNBURG

Notary Public in and for said County and State."

"AFFIDAVIT OF EDISON C. LLOYD

CITY AND

COUNTY OF SAN FRANCISCO)
STATE OF CALIFORNIA) SS

EDISON C. LLOYD, being first duly sworn upon his oath deposes and says:

That from a time several years prior to 1930 he was general superintendent of the warehouses of the Lawrence Warehouse Company of San Francisco, California, which included a warehouse situated at the corner of Second and Brannan Streets in said city, which is now known as the Humboldt Warehouse of the Haslett Warehouse Company, but which up to January 1st, 1932 or shortly thereafter was known as "Lawrence Warehouse 19." That it was a part of affiant's business and duty to know what customers or patrons of the Lawrence Warehouse Company were served by the different warehouses operated by said Company.

That during all the time of his connection with the Lawrence Warehouse Company as aforesaid affiant knew of the business concern, Liquid Veneer Corporation of Buffalo, New York, which is defendant above named, and knows that during all of such employment and up to January 1st, 1932 various products of said Liquid Veneer Corporation were consigned from Buffalo, New York, to, and received by Lawrence Warehouse Company for distribution to customers designated by said Liquid Veneer Corporation.

That during all of said time all goods received by said Lawrence Warehouse Company from said Liquid Veneer

Corporation were received at and taken into said identical warehouse, then known as Lawrence Warehouse 19, now known as the Humboldt Warehouse of the Haslett Warehouse Company, and they were never received at or went into any other warehouse.

That January 1st, 1932 the warehouse business and warehouses of Lawrence Warehouse Company including said Lawrence Warehouse 19, now known as Humboldt Warehouse of the Haslett Warehouse Company were taken over by the Haslett Warehouse Company, which continued to conduct said business and warehouses formerly conducted by Lawrence Warehouse Company.

That affiant has had no connection with such warehouse business, or either the said Lawrence Company or said Haslett Company, since January 1st, 1932, and knows nothing about the details of the manner of conducting business in said warehouses or the customers thereof since about that time, and he is now in the employ of the South End Warehouse Company of San Francisco.

Further affiant sayeth not.

EDISON C. LLOYD

Subscribed and Sworn to before me this 1st day of February, 1934.

KATHERYN E. STONE

Notary Public in and for the said City and County and State."

"AFFIDAVIT OF MARTIN J. CABANA

CITY OF BUFFALO)
COUNTY OF ERIE) SS.
STATE OF NEW YORK)

MARTIN J. CABANA, being first duly sworn upon his oath deposes and says:

That he is the Vice-President of the defendant Liquid Veneer Corporation in charge of sales and shipments, and has been such officer since 1925, and Secretary and Sales Manager before said time since 1903. That as such officer he has been at all times familiar with and had personal knowledge of the facts herein after stated. That this affidavit is made in support of defendant's renewed motion to dismiss and quash the service of summons herein, and is in addition to and supplemental of his affidavits theretofore made, and now on file in support of the original motion to dismiss and quash and set aside the service of said summons.

That for more than thirty-three years last past defendant under its present name and the name of Buffalo Specialty Company has been engaged at Buffalo, New York in the business of supplying its products to customers in California and other states upon mail orders transmitted to it at Buffalo, New York, from said several other states.

That as concerns the State of California its products have during all of the time since the year of about 1910 been supplied to persons within said state by the following methods and none other:

(1) By approving and filling orders received by mail or telegraph at Buffalo, New York, direct from persons desiring to purchase the same and shipping the orders by mail or common carrier direct to the ordering party in California and billing therefor and receiving remittance of the purchase price thereof at Buffalo, New York, from such purchaser.

(2) By approving and filling orders received at Buffalo, New York, by mail or telegraph from traveling salesmen on a commission basis only taking orders from customers within the state of California and forwarding them from within that state to defendant at Buffalo, New York, for approval and upon receipt of such orders if approved shipping and billing the ordered articles direct by mail or common carrier to the ordering party in California and receiving the remittance therefor at Buffalo, New York.

(3) By approving, billing and receiving remittances for orders received at Buffalo, New York, by mail or telegraph either direct from the ordering parties or from commission salesmen taking orders from people within the State of California subject to approval by the company at Buffalo, New York, and if approved shipping the aggregate of a large number of such orders to, first, and up to about January 1st, 1932, the Lawrence Warehouse Company, and, second, after about January 1st, 1932 to the Haslett Warehouse Company, both at San Francisco, California, in bulk by carload or other bulk shipment to be by said warehouse companies reshipped in smaller lots to the various persons whose orders were to be filled.

That in making shipments of all orders during all the times mentioned they were billed to the respective ware-

house companies at the address of the particular warehouse situated at the corner of Brannan and Second Street—the Street number of which was 285 Brannan Street—and the name of which was first “Lawrence Warehouse 19” and later “Humboldt” warehouse of the Haslett Company.

Affiant further says that orders for goods were only filled under either of said three methods, when and after they had been approved by the proper officer of the company at Buffalo and all orders were received by the company subject to their approval or rejection at Buffalo and no one outside the office of the company at Buffalo was authorized or permitted to approve any order or authorize shipment of any goods or extend any credits whatsoever and if any person other than the proper officers of the company, at the home office, had assumed to approve an order or authorized a delivery of the goods or the extension of any credit whatsoever his actions would not have been recognized and no goods would have been shipped or credit extended and that fact was always known to salesmen taking any orders to be a definite policy and they were instructed in all cases that no order could or would be filled until approved at Buffalo, New York, by the officers of the company and that no business could be done or transacted with Liquid Veneer Corporation except at Buffalo. That in so organizing and conducting its business it was the deliberate policy and purpose of defendant to engage in interstate business only and not to in any way conduct any intrastate business.

Affiant further says that in the furnishing of its products to persons in California and other states as well under the third method above mentioned the universal pro-

cedure was as follows during all of the period since the year 1910, to-wit:

That during said time it, defendant, made no shipments whatsoever to any warehousemen in the State of California except, first, said Lawrence Warehouse Company, and since January 1st, 1932, said Haslett Warehouse Company at San Francisco.

That shipments to said warehouse companies from time to time were not solely for reshipment or distribution to persons in California but also for customers in Washington, Oregon and other adjacent states and as the case might be to make a carload lot for economy of distribution.

That from time to time when it would appear from the number of orders coming into the office at Buffalo, from California and surrounding states, that a bulk shipment could soon be made for distribution in said states, the goods called for by said orders would not be shipped direct to the parties ordering but the orders would be accumulated until taking into account the time required for a carload or other bulk shipment to reach San Francisco it was estimated that the orders accumulated by the time of arrival would equal the contents of bulk shipment and thereupon such shipment would be made to either said Lawrence or Haslett Company according to the time when made. That upon the making of such a shipment or shortly thereafter and in due course of business the office at Buffalo would forward to the warehouse at San Francisco separate directions to reship to the parties whose orders were to be filled certain specified kinds of merchandise which were listed in the several instructions. That such separate instructions would generally go forward by

mail in a group following a given shipment so as to reach San Francisco on or about the estimated time of arrival of the freight shipment, and would be followed by additional instructions which it was estimated would arrive at the warehouse by the time it was ready to complete reshipments.

That it was the purpose and aim of defendant not to accumulate any surplus of goods in California and if it appeared that the goods shipped to the warehouse exceeded the amount of goods directed to be shipped from the warehouse, additional shipping directions would be forwarded, or if there appeared to be a deficiency in goods to meet shipping directions the goods would either be shipped to the customer direct from Buffalo or be shipped from the next shipment in bulk. That on some occasions orders for goods may have been cancelled or the approval revoked after a bulk shipment had been made as aforesaid, and as a result thereof a small surplus of goods might at times have accumulated in the warehouse for a short time until that fact was discovered from checking the records whereupon additional shipping instructions would be given to fill additional orders but except immediately upon the receipt of a bulk shipment and after receipt and before the reshipping process was completed was there ever any large amount of defendant's goods in warehouse in California.

With particular regard to the testimony heretofore given by plaintiff to the effect that she saw and conversed with some unidentified man in the office of a warehouse in San Francisco during the years 1930, 1931 or 1932 to the general effect that at some time between the first part of 1930 and the early part of 1932, she visited a warehouse

which she called the Lawrence Warehouse, near the water front and in the warehouse district, in San Francisco, and that in that warehouse she conversed with a man occupying a clerical position, such as bookkeeper or billing clerk, in an office back of a wicket and that said man stated to her the manner in which Liquid Veneer products were sold and that they could be there obtained from a stock of goods kept on hand and that he exhibited to her bills and invoices and showed her a large stock of Liquid Veneer products kept in a room into which a door opened adjacent to such office and explained that orders taken for such goods would be filled from such stock; that affiant says that he has no means of knowing whether plaintiff had any such conversation as detailed by her but in that behalf he deposes and says that never at any time has any person in any warehouse or elsewhere in the State of California been employed or authorized by defendant, directly or indirectly, to sell goods on its behalf or to extend credits or to represent that he had authority to sell goods or to speak for or on behalf of defendant with reference to its method of doing business or to have in his possession purported bills or invoices of goods of defendant, or to be in charge of any goods of defendant except as hereinbefore stated with reference to the handling of bulk shipments of goods to the warehouse companies aforesaid, and neither of said warehouse companies or any of their employees have ever been directly or indirectly authorized to do any of said things and no bills or invoices of goods distributed by defendant through said warehouses were ever in the authorized possession of anyone in California except the purchaser of goods to which they were sent direct from Buffalo and neither said warehouse companies or any of their employees were ever fur-

nished with prices of defendant's products and they would not know the prices at which such goods would or should be sold and except immediately after the arrival of a bulk shipment there was no time at which goods of the defendant were present in any warehouse except in small quantities as an incident of reshipments as aforesaid. That if any person pretending to act on behalf of defendant ever had any conversations with plaintiff of the character referred to or exhibited to plaintiff any bills or invoices for goods of defendant such person was an imposter and such bills and invoices were spurious because no such bills or invoices ever went into the hands of any warehouse or its employees and under the course of business and the practices actually carried out neither of said warehouse companies or their employees had any thing to do with billing or invoicing shipments of goods of defendant but that was all done in all cases from the office of the Liquid Veneer Corporation in Buffalo, New York. To make emphatic and definite to the upmost possible extent that defendant had no one representing it in California authorized to act for it in the matters above referred to as having been testified to by plaintiff affiant further says that the establishment or employment of a person in or about any warehouse to present or act for defendant except in handling bulk shipments of goods was never discussed with any person or ever considered by defendant.

Further deponent sayeth not.

MARTIN J. CABANA

Subscribed and sworn to before me this 10th day of August 1934.

C. B. McCOLLUM

Commissioner of Deeds in and for the City of Buffao,
New York."

After argument,

THE COURT ORDERED, "The Motion is Denied. Exception for the defendant. Bring the Jury in. Are you going to have an opening statement?"

SUBSTITUTIONS OF ATTORNEYS

For the plaintiff:

2-24-33, Harry Graham Balter and Elijah M. Smuckler for Elijah M. Smuckler.

5-7-35, at time of trial, Harry Graham Balter and Isador I. Smuckler for Harry Graham Balter and Elijah M. Smuckler.

For the defendant: each reciting the substitution was for purpose of special appearance only and not to be considered a general appearance in the action by defendant;

8-12-32, J. F. T. O'Connor for Norman S. Sterry and Gibson, Dunn & Crutcher;

1-17-35, Paul V. Sheehan for J. F. T. O'Connor and A. G. Divet.

"NOTICE TO PRODUCE.

To the defendant above named, and to Paul V. Sheehan, Esq., 1712 Liberty Bank Building, Buffalo, New York, its attorney:

You and each of you will please take notice that you are hereby directed and required to produce upon the trial of said action the following instruments, papers and documents:

1. Carbon copy of letter of June 2, 1931, addressed to Young's Market, Seventh Street, Los Angeles, California,

and signed by Liquid Veneer Corporation, Martin J. Cabana, Vice-President, as set out in paragraph VI of the complaint herein.

2. The paper carton, label, bottle and specimen of product called "Liquid Veneer Polish", as manufactured by defendant company on June 2, 1931.

3. All correspondence between Liquid Veneer Corporation and Young's Market Company, of Los Angeles, California for the years 1929, 1930, 1931, and 1932, relating to "French Veneer Polish" or French Veneer Manufacturing Company, Los Angeles, California, or relating to Mrs. L. S. Smuckler of Los Angeles, California.

4. All correspondence between Liquid Veneer Corporation and the May Company, of Los Angeles, California, for the years 1929, 1930, 1931 and 1932, relating to "French Veneer Polish" or French Veneer Manufacturing Company, Los Angeles, California.

5. The company's records for the years 1929, 1930, 1931 and 1932 showing all merchandise shipped to San Francisco, California, and also showing all merchandise distributed from San Francisco to points in California, also all defendant's bills of lading, invoices and orders during said period in connection with said shipments.

6. All records showing warehousing of Liquid Veneer Polish by the defendant company with the Haslett Warehouse, 37 Drum Street, San Francisco, or the Lawrence Warehouse, Company in San Francisco, California. Also all inventories of merchandise kept at either of these warehouses on account of the defendant company during the years 1929, 1930, 1931 and 1932.

You will further take notice that upon your failure to produce said papers, instruments and documents, secondary evidence of the contents thereof will be offered and introduced on behalf of the plaintiff.

Dated this 1st day of February, 1935.

PELTON, WARNE & BALTER

(Signed) By Harry Graham Balter
Attorneys for plaintiff."

THE TRIAL

The jury was duly impaneled and sworn to try the issues. It was admonished by the Court and retired from the Court room when the following proceedings were had out of its presence.

Counsel for defendant moves to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The Court states, "No, I will not entertain at this time a motion addressed to the sufficiency of the complaint because of its being entirely untimely."

SHEEHAN: I would take it that at any time we could move to dismiss the complaint as not stating a cause of action.

THE COURT: No.

SHEEHAN: Otherwise, if you haven't got a cause of action stated they are not in Court.

THE COURT: Proceed in the manner indicated, and your Motion is denied; that is I will decline to hear it at this time because, out of all fairness to the Court, such a motion should have been presented a long time ago if there was any intention on the part of the defendant to present any such question as that.

SHEEHAN: Well, of course we intended to but we thought we could present it on the opening of the trial.

THE COURT: Proceed.

After opening statement by Mr. Balter on behalf of plaintiff, the following proceedings were had:

SHEEHAN: Your Honor, at this time I want to make a motion to dismiss the complaint on the plaintiff's opening, for the fact that he has read the complaint to the jury and it does not allege any jurisdictional facts. There is nothing in the complaint of anything that says in this letter that it was alleged of and concerning this plaintiff; that there is nothing alleged in the complaint in any way that shows a publication of what he claims is libel in any way, shape or manner; and there are no facts of damage alleged in any way; there is nothing in the complaint that shows it was an unprivileged communication—.

THE COURT: There is what?

SHEEHAN: There is nothing in the complaint that shows it was not privileged; in other words, there is no allegation that it was libelous and an unprivileged communication.

THE COURT: Motion is denied.

MR. SHEEHAN: And exception.

(Testimony of Evelyn Schoos)

After opening statement on behalf of defendant the following occurred:

EVELYN SCHOOS,

witness on behalf of plaintiff, was sworn and after stating her name and that she was employed by Young's Market Company, the following proceedings took place:

MR. SHEEHAN: Now, your Honor, to preserve my rights I just at this time wish to object to any evidence being introduced as to any allegations of the complaint, and particularly with reference to this letter and any allegations contained in respect to the letter alleged in the complaint, on the ground that the complaint does not state facts sufficient to constitute a cause of action in that there is no libel alleged in the complaint; and on the second ground, that the letter therein contained is a privileged communication under the laws and statutes of California; on the third ground that there is no publication of the libel alleged in the complaint; and the fourth ground, that the complaint in no way, shape or manner in any way indicates that this letter has been in any way of and concerning this plaintiff Lena G. Smuckler in any way; that the only reference in the letter is to a "French Veneer" and the name of Mrs. Smuckler does not appear; and that there is not any indication in the letter in any way, shape or manner that the defendant ever knew of this plaintiff; and on the further ground that there is no element of damage of any name, nature or description alleged in the complaint, and that no allegation of general damages has been made or no allegation of general damages is sufficient.

(Testimony of Evelyn Schoos)

THE COURT: I understand counsel suggests that he will amend, or proposed amendment to his complaint respecting the matter of doing business.

MR. BALTER: At this time for the purpose of the record, although we do not think it is necessary, we ask leave of Court to amend paragraph II of the complaint, reciting "That at all times herein mentioned, LIQUID VENEER CORPORATION WAS, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York." ask that we amend that to include by interlineation the clause "and doing business within the State of California."

MR. SHEEHAN: May I suggest that your Honor let me have a ruling before you pass upon his amendment?

THE COURT: In view of the proposed amendment the objection is overruled.

MR. SHEEHAN: Exception.

THE COURT: Exception to the defendant. Proceed.

It was proposed the amendment be by interlineation, adding clause "and has at all times herein-after mentioned been doing business in the State of California."

MR. SHEEHAN: I object to the amendment being allowed on the ground that it creates a cause of action that has not existed, and that it injects entirely new matter in this complaint which, of itself, is insufficient to constitute a cause of action and of grounds of lack of jurisdictional allegations. And I would like to take an exception to that.

THE COURT: Yes, overruled. The amendment may be allowed.

(Testimony of Evelyn Schoos)

Witness then testified:

I am and have been since November 1929, employed by Young's Market Company. Until August of last year I was Secretary of P. N. Young, Secretary-Treasurer of Young's Market Company, who has retired because of ill health. He had certain correspondence in his private files. About May 1, 1931, in compliance with Subpoena issued out of this Court, I made an effort to find the original of a letter dated June 2, 1931, addressed to Young's Market, 7th Street, Los Angeles, California, signed by "Liquid Veneer Corporation, Martin J. Caban, Vice-President." Prior to that time I had tried to find this same letter at the request of the plaintiff or her attorneys. I searched the complete files of the office and could not find a copy of the letter or an original letter.

Q: I show you here what purports to be a copy of a letter dated June 2, 1931, addressed to Young's Market, 7th Street, Los Angeles, California, signed "Liquid Veneer Corporation, Martin J. Cabana, Vice-President" and ask you to examine it and state whether or not you can tell that that is copied on stationery used by the Young's Market Company.

Defendant objected to the testimony as incompetent, irrelevant and immaterial and that the original letter should be introduced instead of what is purported to be a copy thereof. The objection was overruled, exception taken and the witness testified.

We used stationery similar to this bond paper and as far as I know this came from our office.

(Testimony of Elijah M. Smuckler)

On

CROSS-EXAMINATION

she testified.

Lots of people used that type of bond paper, it is a standard product and I do not contend that the only people that used this bond was Young's Market.

ELIJAH M. SMUCKLER,

called as a witness for plaintiff was sworn and testified on direct examination:

I am a son of the plaintiff. On or about March 1932, I went to Young's Market and there spoke to P. N. Young, an officer of the Company. I am not familiar with what office he held. I believe he was a Vice President or Secretary, one or the other. He was the managing officer of the Young's Market Company in charge of that department. He exhibited to me a letter on the stationery of the Liquid Veneer Corporation. I received a type written copy of the letter which I compared with the original letter, word for word, and I found that the copy compared the same with the original letter. I left the original letter with Mr. Young and drafted my complaint on the copy. - - - Subsequent to the filing of the complaint I went back to Young's Market and Mr. Young was not there. This copy which purports to be a letter dated June 2, 1931, addressed to "Young's Market, Seventh Street, Los Angeles, California" and signed "Liquid Veneer Corporation, Martin J. Cabana, Vice-President" is a copy of the letter which was given to me at Young's Market when I requested the original. This is the document that was given to me at the store.

(Testimony of Elijah M. Smuckler)

MR. BALTER: All right. At this time, your Honor, having first served a notice to produce on the defendant, to produce their office carbon copy, which they have failed to produce, and having shown that the original records are lost or cannot be found, and having shown that the original complaint or the letter set out in the original complaint was copied from a letter actually in existence, we have a right to prove by secondary evidence which we offer in evidence at this time the copy of the original letter as Plaintiff's Exhibit 1.

The copy of letter was admitted as plaintiff's Exhibit 1.

On

CROSS-EXAMINATION

the witness testified.

I am an attorney and was the original attorney of record. I withdrew as such because of taking the witness stand here and did not desire to act as a witness and also as attorney in the case at the same time. That is the only reason. Since the inception of this action I have been suspended from the practice of law by the Bar Association of California, and have been suspended from the State Courts on specifications contained in a charge.

I was informed that Mr. Young had such a letter by my mother. She was informed by Mr. Young. I know of no relation of mine or my mother in the Young's Market or employed there.

(Testimony of Paul V. Sheehan)

Discussion followed between the Court and the attorneys as to the original letter; Counsel for plaintiff stating that P. N. Young, who had the original letter, has been declared incompetent and his records cannot be had. The Court suggested the document be placed in evidence. The defendant took an exception to its admission on the ground that it was incompetent, irrelevant and immaterial and not binding on the defendant. Counsel for defendant stated he received a Notice to Produce through the mail and had made a search for the copy of letter but could not find it. The Court then directed Mr. Sheehan, attorney for defendant, to take the witness stand.

PAUL V. SHEEHAN,

after being first sworn testified:

"I do not know of my own knowledge that the defendant in this action did not have a carbon copy or any copy of the original letter except that I asked for it and I have the note in my file in which I think I requested it. They say they have not got it. This is the best of my knowledge. I have no officer here to testify that the copy is not in existence.

Counsel for plaintiff states he desires to read the letter to the jury, when counsel for defendant announces "This is all under my objection and exception." The letter is then read as follows:

(Testimony of Paul V. Sheehan)

“LIQUID VENEER CORPORATION,
London, England — Bridgburg, Canada.

Manufacturers of
HOUSEHOLD AUTOMOTIVE
SPECIALTIES.

Buffalo, N. Y., U. S. A.

Youngs Market

7th Street

Los Angeles, California

June 2, 1931

Gentlemen: Attn: General Manager.

Our inspector reports your selling and offering for sale a product called ‘French Veneer’, this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark ‘Liquid Veneer’ as well as our common law rights.

We recently found this product on sale at the May Company. We have explained our position to the May Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Courts as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

We have had more or less difficulty with these people who manufacture this so-called ‘French Veneer’, have tried to purchase evidence against them individually, but they moved around from one place to another, denied their

(Testimony of Paul V. Sheehan)

identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

It is a different matter, however, where we find a responsible house, like yourselves, handling an infringing product, because at the end of a lawsuit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We therefore request that you immediately discontinue the sale of this infringing product and advise us to that effect promptly.

The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to someone else who has spent a fortune in building up their business under that name.

His object for adopting the name 'French Veneer' is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing 'French Veneer' at the May store believing she was receiving 'Liquid Veneer' which she had been using for years. This housewife on finding that she had purchased

(Testimony of Paul V. Sheehan)

the wrong Veneer returned it to the May Company and received the proper genuine 'Liquid Veneer'.

We will await your prompt reply, and remain, meanwhile.

Yours very truly,

LIQUID VENEER CORPORATION,
MARTIN J. CANABA,
Vice President."

MR. SHEEHAN: In regard to that, your Honor, I ask all the evidence be stricken out, or the letter be stricken out on the ground that it obviously is no libel; that it is a privileged communication between Young's Market and Martin J. Cabana, or the Liquid Veneer; that there is not even a mention of this plaintiff in this letter. There is no allegation in the complaint that says it is of and concerning this plaintiff at all. This plaintiff was doing business under a fictitious name and there is nothing to show in any way that this defendant even knew that there was such a person as Mrs. Smuckler in existence.

THE COURT: It refers to her product, doesn't it, by name?

MR. SHEEHAN: It refers to 'French Veneer', yes, your Honor, but that is not Mrs. Smuckler.

THE COURT: There is no evidence that anybody else was selling or using French Veneer. I think that is a matter that is for the jury to say, whether they have reference to the plaintiff in the action or not, clearly. Overruled, or motion denied. Proceed with the witness.

MR. SHEEHAN: Exception.

(Testimony of Benjamin L. Strauss)

BENJAMIN L. STRAUSS,

Witness on behalf of plaintiff, being sworn, testified as follows; on

DIRECT EXAMINATION,

I am and have been for the past 12 years, merchandise manager and Vice-President of the May Company in Los Angeles. Before that I was Vice-President of a Chicago mail order company; have been in the merchandise business thirty odd years. I have known the plaintiff a little over twelve years, when I came to the May Company, approximately in 1923. At that time Mrs. Smuckler was demonstrating the French Veneer, that is offering it for sale on the fourth floor. I have known the defendant considerably over 15 years and continuously since I came to the May Company in 1923. The May Company has purchased merchandise from the defendant as well as the plaintiff.

Q: MR. BALTER: Did you on or about March, 1929, receive communication from the defendant, Liquid Veneer Corporation with reference to the plaintiff's product?

MR. SHEEHAN: I object to that as irrelevant, incompetent and immaterial in view of the date that is mentioned.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: Yes. This letter, dated March 27th, 1929, was received and has been in my file since that time as a part of the regular business correspondence between me and the Liquid Veneer Corporation.

(Testimony of Benjamin L. Strauss)

Counsel for plaintiff offers the letter in evidence. The defendant objects to it as "irrelevant, incompetent and immaterial and inadmissible under the pleadings, not properly authenticated and in no way relevant to the allegations of the complaint". The objection was overruled. Exception taken. Admitted as plaintiff's Exhibit 2, and read to the jury. The letter being as follows:

"May Department Stores Co., March 27, 1929.
Broadway & 8th Street,
Los Angeles, Cal.

Attention: General Manager

Gentlemen:

We are just in possession of legal evidence showing that you are handling and selling a preparation called 'French Veneer' alleged to be made by French Veneer Mfg. Co., Los Angeles, Cal.

Our attorney advises that this is a direct violation of our registered trade mark 'Liquid Veneer' as well as our common law rights, and that in handling this article you are equally liable for damages with the manufacturer thereof.

We have had an experience with this manufacturer dating back to 1913. At that time the party operating this company seemed to be a man and wife by the name of Mr. and Mrs. Smuckler, residing in Los Angeles. We had difficulty locating them because of their having moved around.

Our records here show it was difficult for our representatives to meet the party in charge who was always out

(Testimony of Benjamin L. Strauss)

of town when our people called. Finally we were told by someone to go ahead and do as we saw fit; that they would manufacture and sell French Veneer in spite of any action on our part. Their argument was that they had no financial responsibility, therefore we could not take anything from them.

After a survey of the territory we found their sale was very meager and they apparently, at least for a time were inactive, because of this we allowed the matter to rest for the time being, thinking they would finally desist.

We now find that you have this product in your store and are selling it. We don't know if there are others but by reason of our position we must of necessity kindly ask you to immediately stop the sale of this product and take it off your market so far as you are concerned. We are obliged to request this because were we not to do so we would jeopardize our exclusive rights to our own trade mark 'Liquid Veneer' which you will appreciate is a very valuable one to us. We are in the unfortunate position of demanding of you, a friend and customer, that you immediately stop the sale of this infringing product. We fully believe that you would act likewise were our position reversed.

It is not infrequent that irresponsible people will foster an infringing product on responsible merchants like yourselves, regardless of the fact that they are selling you a lawsuit. We have no doubt here as to how you will feel about such dealings.

Our desire is that you tell us how much of this product you have had and just what you will do with it. We will appreciate it also if you will give us the exact address of

(Testimony of Benjamin L. Strauss)

the manufacturer as we want to go to him and settle this question once and for all at this time.

We are not seeking trouble, we are merely determined to insist that our trade mark and trade rights shall be respected and our policy is to do this in just as friendly and businesslike a way as possible.

These people may tell you about their trade mark on F. V. M. Co. but that has absolutely no bearing on their infringement of our trade mark 'Liquid Veneer' which is well established and has been adjudicated in Court.

Awaiting your reply, we remain,

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

MJC-MAF

Vice President."

WITNESS CONTINUED: I replied to that letter. This carbon copy of letter, dated April 2, 1929, addressed "Liquid Veneer Corporation, Buffalo, New York", is a carbon copy of the original letter of The May Company in reply.

Objection to the letter was made on the ground that it was "irrelevant, incompetent and immaterial; inadmissible under the pleadings and not binding in any way upon the defendant and having no relation whatsoever to the cause of action; on the further ground that anything that Mr. Strauss might have said would be hearsay." The objection was overruled, and exception taken. The letter was admitted as Plaintiff's Exhibit 3, and was read to the jury. It is as follows:

(Testimony of Benjamin L. Strauss)

"Liquid Veneer Corporation,
Buffalo, New York.

April 2nd, 1929

Attn: Martin J. Cabana.

Gentlemen:—

I am this day in receipt of your letter calling our attention to the fact that French Veneer Mnfg. Co., of Los Angeles are infringing on your rights. We are always glad to co-operate and from this day on we will discontinue the sale of French Veneer.

Yours very truly,

BLS/O

-----"

MR. SHEEHAN: I ask that the letter be stricken out on the ground that it was not the original and that it was hearsay and ask for an exception.

THE COURT: Motion denied.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: I received this letter dated April 18, 1929, from the Liquid Veneer Corporation. It was in reply to my letter which I had previously sent to them.

Counsel for plaintiff offered it into evidence. Counsel for defendant objected "to it all on the grounds heretofore stated; that it is irrelevant, incompetent, immaterial and inadmissible under the pleadings and that it is prior to June 2, 1932, and has no bearing whatsoever in any way, shape or manner upon any of the issues involved in this action.", and upon the further grounds that it occurred three years prior to the date of the letter set out in the complaint, which is the basis of this action, and is to a

(Testimony of Benjamin L. Strauss)

different concern, and the further ground that "This letter which they have set forth in their complaint, which is the basis of this cause of action, is June 2, 1931. Now, they cannot go behind this cause of action and claim something else way back three years before and make it up that this is anything that they can claim is due to this letter; that they certainly can't go back 20 or 30 years and claim for everything that ever happened before June 2, 1931. That is what they are claiming, that this lady was libeled or this woman was libeled by this letter."

The objection was overruled, an exception taken. (In the ensuing discussion it developed that the reference to the year 1932 was an error and that counsel meant 1931, the date of the letter set forth in the complaint.) The letter was admitted as plaintiff's Exhibit 4 and was read to the jury, and is as follows:

"The May Company,
Broadway at Eighth,
Los Angeles, Cal.

April 18, 1929.

Att: General Manager

Gentlemen:

This will acknowledge receipt of your Mr. B. L. Strause's letter of the 10th. We judge Mr. Strause's reverse decision to take this infringing French Veneer off sale is due to being misinformed. If we are in error and the May Company feel as Mr. Strause expressed himself for your company, we of course have no alternative but to proceed to prove our complaint in Court. Any neglect on our part to do so would jeopardize our very valuable

(Testimony of Benjamin L. Strauss)

rights now owned exclusively in Liquid Veneer trade mark and good will.

We have not commenced action against the manufacturers of this so-called French Veneer; they have jumped around so that we could not put our finger on them and the mercantile companies indicate there is no financial responsibility represented by this company. In view of this and your apparent decision now to market this infringing product we assume you will have no objection to our enjoining you with the French Veneer Company as co-defendants in this action we will start in the United States District Court to stop the manufacture and sale of this infringing substitute sold as 'French Veneer'.

It is necessary to enjoin the May Company in this action because the manufacturer is financially unable to meet damages and costs in our favor, and the May Company are responsible.

As you perhaps may know, under our laws anyone aiding or abetting by selling or offering for sale an infringing product is equally liable with the manufacturer thereof; the seller is simply assisting the manufacturer in an unlawful act, and we of course very naturally wish this action to be started against responsible people so that we may recover at the end of the action such damages as the Court would allow.

With reference to this alleged trade mark on French Veneer, Mr. Strause has been misinformed in this connection. Our records dating back to 1914 show that our attorneys investigated the matter at the patent office in Washington; that the trade mark is not on French Veneer but simply on F. V. M. Co. and has absolutely no virtue or value in opposing our trade mark Liquid Veneer.

(Testimony of Benjamin L. Strauss)

Because of our many years experience in matters of this kind and our knowledge as to the costs thereof, we would suggest that you look into this matter a little closer and don't take our word but submit it to a real patent attorney, not a commercial lawyer, but a man that makes a practice of patent law.

Because you are valued customers we want to give you every opportunity to know the facts and decide to your best interest before we proceed in this case. If it were otherwise we should not be writing this letter but our patent attorney would be writing a bill of complaint instead.

We are not seeking litigation but you will of course see we must insist upon our trade mark and common law rights being respected just as you would undoubtedly do were our positions reversed.

We await your decision in the matter and ask that you let us have it at the earliest possible date because we cannot afford to stand by and see our trade mark and trade rights disregarded; we have altogether too much at stake.

With kindest regards and assuring you our action will be made just as friendly as we know how to make it, we remain

Respectfully yours,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President.

MJC-MAF

P. S. The enclosed are a few extracts from our record of this case dating back to 1914.

(Testimony of Benjamin L. Strauss)

We are registering this letter to make this legal notice."

MR. SHEEHAN: We ask that be stricken out on the ground it is not authenticated.

THE COURT: What is that?

MR. SHEEHAN: Exception.

WITNESS CONTINUES: This letter, dated April 30, 1929, addressed to the May Company, was received by us and is part of the records of the Company.

Counsel for plaintiff offers the letter into evidence. Counsel for defendant objects "to it on all the grounds heretofore stated in connection with the other correspondence offered; on the ground that it is not authenticated, and take exception to it." The Court overruled the objection, the document was admitted as plaintiff's Exhibit 5, was read to the jury, and is as follows:

"The May Company,
Broadway at Eighth,
Los Angeles, Cal.

April 30, 1929.

Att: Mr. B. L. Strauss,

Gentlemen:—

We have report from our representative which seems to further carry out what we have suspected right along, that the sale by your good company is merely aiding and abetting an infringing manufacturer to palm off his imitation so-called French Veneer, as and for genuine Liquid Veneer. We quote a report just received from our representative.

(Testimony of Benjamin L. Strauss)

'Miss. Kaester reports that one lady returned a bottle of French polish to The May Co., said she thought she was buying our genuine Liquid Veneer and she wanted her money back. She said it was not the goods she had been buying; said she had been using Liquid Veneer for many years.

The buyer at The May Co. is a boyhood friend of Mrs. Smuckler, the manufacturer of this so-called French Veneer.

There is a basket of French Veneer setting under one of the *babes* at The May Co. Store.'

We feel it is not your company's wish to be a party in aiding and abetting the sale of a product that is sold by unfair trade methods. Your help in this direction is of very material aid to the manufacturer and is injurious to us, as well as unfair to the public. Already you can see there had been confusion caused among your customers who bought French Veneer thinking they were getting the original Liquid Veneer which they had formerly bought from you.

With these facts in hand we feel sure you will see the unreasonableness and injustice to us and instantly take this infringing product off the market and advise us of your action.

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."

(Testimony of Benjamin L. Strauss)

WITNESS CONTINUES: This letter dated April 13, 1931, addressed to the May Company, was received and is a part of the records.

Counsel for plaintiff offers the letter into evidence. Counsel for defendant objects, stating, "I wish to interpose the same objections that have heretofore been interposed to all of the letters mentioned, in particular reference to the dates on each one of the letters and on the one in question." Objection was overruled and an exception duly noted. The letter was admitted as plaintiff's Exhibit 6, was read to the jury and is as follows:

"The May Company,
Broadway at Eighth,
Los Angeles, Calif.

April 13, 1931.

Atten: Mr. B. L. Strauss,

Gentlemen:—

I have your favor of April 9th, stating that when you returned from your vacation you had decided to temporarily discontinue French Veneer demonstration. Do I understand by this that you intend to renew the sale of this imitation of our Liquid Veneer?

I thought this whole question had been settled definitely last year when you took the stand taken with the manufacturer of this so-called 'French Veneer', but if you have changed your mind I will appreciate your stating so, and know you will, because you are not of the kind who would state one thing and do another.

With reference to your inquiry as to why we don't stop the sale of this through the manufacturer, I thought we

(Testimony of Benjamin L. Strauss)

had made this quite clear but will now explain. The manufacturer of this product is absolutely irresponsible and had jumped from pillar to post so that we have not been able to put our finger on him, our representatives called a number of times and they even denied their own identity. In view of these circumstances, it is perfectly natural for us to take the easier way out and that is, to attack anyone who is a responsible house and able to pay, because under the law of the United States, both the trade-mark law and the law of unfair competition, the distributor, whether jobber or dealer, who sells or even offers for sale an infringing product is equally liable with the manufacturer, and your own patent attorney will confirm this to you.

With reference to a lawsuit. These are very expensive luxuries. They do not merely involve the engagement of an ordinary commercial attorney, but it is necessary to have a patent attorney, and these fellows charge \$100. a day and their expenses, some of them more, and they drag out the matter of taking testimonies which would have to be taken in Buffalo as well as in Los Angeles and which would mean that the attorneys for our respective companies would have a nice joy-ride, ours going to Los Angeles and yours coming to Buffalo taking testimonies, which is all done by deposition and then the whole matter is printed and submitted and argued in the United States District Court.

If you think that this matter is worth the May Company's time and yours to bother with, we have no alternative but to go ahead. Any suit we would commence against the May Company would be in the friendliest manner we could possibly have it, because we consider you

(Testimony of Benjamin L. Strauss)

customers and friends and the only reason we would commence an action is because we simply could not help ourselves. Our trade-mark 'Liquid Veneer' is not only well established but it has been adjudicated in the United States Court and a failure on our part now to prosecute 'French Veneer' would seriously involve us and according to our patent attorneys would invalidate our trade-mark which has cost us millions of dollars, because if we permitted 'French Veneer' to go ahead uninterrupted it would be like acquiescing to its validity and others that would begin jumping in the field and the first thing we would know would be that there would be all kinds of Veneers on the market.

The writer has gone through all of this for the past twenty-five years and knows just what he is saying.

If it is your desire to handle this infringing product with the objectionable name 'French Veneer' because you think it is good or for any other reason, why don't you have the manufacturer get on his own grounds and adopt another name. There are many good names which he could use for his polish. He never did use the word 'Veneer' until Liquid Veneer had attained prominence and he did it with the deliberate purpose of trading on our good will and name, notwithstanding anything else he may tell you to the contrary. We can prove this and prove it so conclusively that there will be no question about the matter.

(Testimony of Benjamin L. Strauss)

I hope you will accept this letter, Mr. Strauss, in the same spirit in which it is written and assure you of our very best wishes, with the request that you advise me frankly just what you decide to do in the matter, meanwhile believe me,

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."

WITNESS CONTINUES: This letter, dated April 23, 1931, addressed to the May Company, was received by us and is a part of the records of the Company.

Counsel for plaintiff offers the letter into evidence. Counsel for defendant interposed "the same objection as heretofore interposed to the previous correspondence, and particularly with relation to the date of the letter." The objection was overruled, an exception was duly noted, the letter was admitted as plaintiff's Exhibit 7, was read to the jury and is as follows:

"The May Company,
Broadway at Eighth,
Los Angeles, Calif.

April 23, 1931.

Atten: Mr. B. L. Strauss.

Gentlemen:—

Your favor of April 18th is before the writer. First of all I want to congratulate you on your good business judgment in deciding in the manner you have.

Next I want to assure you that you are misinformed when you are told that our representative would be able

(Testimony of Benjamin L. Strauss)

to lay his hands on the manufacturer of this so-called 'French Veneer'.

We have had a trial of this for several years. The manufacturer, both the man and his wife, have dodged us and have even gone so far as to deny their own identity. I believe, Mr. Strauss, I sent you part of the record we had on these people dating back some years. We tried to buy evidence against them at their own place of business, which, as the writer recalls, was an insignificant store or residence, and we utterly failed to secure the evidence, they refused to sell their product to our representative and as the writer recalls it they denied their own identity.

Possibly now they are of a different frame of mind and would like to get a little free advertising by having us sue them. If you should encounter these good people and care to bother with them at all, explain that when we commence an action against them we will enjoin some responsible customer or distributor of their product, making a joint suit so that whatever Smuckler and his wife are unable to pay, due to financial circumstances, their distributor will make up for it at the end of a lawsuit.

I hope you will understand this situation fully now Mr. Strauss and if there is anything further you would like to know which is not clear, please feel free to write us fully on the subject.

Meanwhile, we remain, with kind regards,

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."

(Testimony of Benjamin L. Strauss)

WITNESS CONTINUES: This letter, dated May 1st, 1931, addressed to the May Company, was received by us and is a part of the records of the Company.

Counsel for plaintiff offers the letter into evidence. Counsel for defendant interposed "the same objection as heretofore interposed to the previous correspondence, ESPECIALLY in reference to the date." The objection was overruled, an exception was duly noted, the letter was admitted as plaintiff's Exhibit 8, was read to the jury and is as follows:

"The May Co.,May 1, 1931.
Broadway at Eighth,
Los Angeles, Calif.

Atten: Mr. B. L. Strauss,
Vice President.

Gentlemen:—

Possibly you are not aware of it that the sale of so-called 'French Veneer' is still on at one of your departments in your store, notwithstanding the demonstration has been taken off.

To the best of our knowledge we believe this is unknown to you but not to some other gentleman in your employ who is a personal friend of the manufacturer of this infringing imitation of our product.

We went through this identical matter with the great department store in Washington, Woodward & Lothrop, Washington, D. C. This great department store immediately ordered the stock out of their place while the writer was there talking to them, and we never have had the

(Testimony of Benjamin L. Strauss)

slightest doubt but what it is out to stay. We cannot help but feel that we are entitled to expect similar action on the part of your great institution, who has given its word as to the policy intended.

It is not our desire to injure anybody. If these imitators of our products want to go on doing business, why don't they adopt a trade name of their own, which would be legal, and build their business upon the quality of their product and on their own trade mark or name, as we have had to do.

We have all the evidence we need to prove that French Veneer is confusing to your customers, who in many cases believe it belongs to the Liquid Veneer Corporation and is the same as Liquid Veneer, and we know that the Court would order in our favor if we bring suit. We don't feel like bringing Smucklers in Court, because they are not responsible and while we would get an injunction against them, it would be all an expense and nothing coming in as a result of the litigation. It is for that reason when we commence an action we will enjoin one of Smuckler's customers and a responsible one and up to the present time your esteemed house is the only house we know of handling their so-called 'French Veneer'.

Will you please settle this question immediately and finally, as you will see the importance of the matter while not very great from your angle, it is exceedingly important to us?

We will await your prompt reply with interest.

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."

(Testimony of Benjamin L. Strauss)

WITNESS CONTINUED: At first we temporarily suspended the sale of French Veneer. This was in 1929.

Q: (By counsel for plaintiff) 1929? Did you suspend that as the result of the letters sent to you in this case?

MR. SHEEHAN: I will object to that as calling for the witness' conclusion.

THE COURT: Well, no. It is not objectionable upon that ground I would think. He was the manager.

MR. BALTER: Geberal manager, your Honor.

THE COURT: An executive. Objection overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: I sent for the executive head of the buying department, known as our house furnishing goods department, trying to keep out of litigation in stopping the sale of it until we had clarified the condition and found out whether it was an infringement or not.

Objection by counsel for defendant to the testimony "as irrelevant, incompetent and immaterial as to what transpired between Mr. Strauss and the party he said he was talking to". The motion was denied and exception noted.

WITNESS CONTINUED: Referring to plaintiff's Exhibit 3, the carbon copy of letter sent by me on April 2, 1929, to the Liquid Veneer Corporation, my memory is refreshed as to the date when I ordered the discontinuance of French Veneer. We kept up the discontinuance of the sale of French Veneer until this action was brought. It was not returned at any time before 1931. The name of French Veneer was changed to "French Polish" and put into stock. At no time did we advise the Liquid Veneer Corporation after we discontinued the sale of French Veneer as to why we discontinued its sale.

(Testimony of Benjamin L. Strauss)

The witness was asked by plaintiff's attorney, "When this first took place, Mr. Strauss, this correspondence between yourself and Liquid Veneer Corporation, did you express the view of the May Company on this subject of the Liquid Veneer?" The witness answered, "We did, we asked them to prove that this was an infringement." Objection was made to this evidence on the ground that it was not the best evidence. The objection was overruled and exception was noted.

WITNESS CONTINUED: We asked or notified them that if it was a matter of litigation between themselves and the manufacturers of French Veneer that they could locate them and buy the product and find them through ourselves. This they never attempted to do. French Veneer was taken off sale in the year 1928, 1929 and the greater portion of 1930.

Q: (Plaintiff's attorney) And in 1930 it was restored as "French Polish"?

A: I can't answer that question.

Q: Anyway, French Veneer was never restored since 1929?

MR. SHEEHAN: Your Honor, I wish to object to that testimony and have it stricken out on the ground that this is all prior to the date of the writing of the letter in the complaint, which is dated June 1, 1931, or June 2, 1931.

THE COURT: Mr. Balter, suppose that had been, what would be the importance of it?

MR. BALTER: Showing the measure of damages, your Honor, now. This product French Veneer was destroyed as a business of the plaintiff on a certain date.

(Testimony of Benjamin L. Strauss)

She subsequently, maybe two or three years later, had to start all over again and try to sell a new product. We want to show the extent of the damage.

THE COURT: When do you conceive that its use was destroyed?

MR. BALTER: As far as the May Company was concerned, their letter of April the 2nd, 1929, established the fact that 'We are always glad to cooperate and from this day on we will discontinue the sale of French Veneer'.

THE COURT: Is that the witness' statement that it was discontinued then?

MR. BALTER: Yes. I asked the witness that.

THE COURT: In 1929?

MR. BALTER: And for a period of several years the plaintiff had no product with May Company, and then when she did put a product on, at the suggestion of Mr. Strauss, because of reasons which he can explain, she put on a new product with a new name, meeting new sales resistance. The jury has a right to consider these elements in assessing the damages to be awarded.

MR. SHEEHAN: I object to it all, your Honor, because, evidently, we have got to be apprised of something here.

THE COURT: Because of what? I am not following you.

MR. SHEEHAN: They claim that this letter that is the basis of this damage is dated June 1st—

MR. BALTER: 2nd.

MR. SHEEHAN: —2nd, 1931. Obviously, anything that transpired previously to that has no bearing on the letter because the letter was not in existence.

(Testimony of Benjamin L. Strauss)

THE COURT: LET ME see the file.

The Court then read the allegations of the complaint and stated: "And the allegation is of general damage to the business of plaintiff. Why, then, is not this evidence admissible?"

MR. SHEEHAN: Because, your Honor, this is three years prior to the time of writing the letter.

THE COURT: But the allegation in the complaint is that as a result of these various letters not confirming them to any one.

MR. SHEEHAN: But we are not apprised of anything else we are charged to libel except this thing that they put in here.

THE COURT: I think the allegation of the complaint that I have just read is clear and distinct to the effect that letters were written, is it not? Certainly it is, because I just read the allegations. Now, in the absence of a motion for particulars or something of that sort, I think the letters are admissible. They are already admitted, at any rate, and it is a matter for the jury to pass upon, to say whether the plaintiff suffered any damage, of course, and whether, if she did suffer damage, that was attributable or reasonably the result of the letters.

Discussion followed in which counsel for defendant stated that the claimed libel arising in this case arose out of a specific letter which was dated June 2, 1931, and that previous letters are all irrelevant, to which counsel for plaintiff stated that defendant has not asked for a Bill of Particulars and that for the purpose of showing damage and to show the course of conduct of the defendant over a period of years his field was very broad. The Court read over Paragraph IX of the complaint and stated:

(Testimony of Benjamin L. Strauss)

THE COURT: Unless your letter is the cause of your damage these letters then, while they are relevant and material as showing intent, are not an element of the damage.

MR. BALTER: May I refer your Honor's attention to paragraph VI: 'That for a long time prior to this date, the defendant has continuously and systematically and for the purpose of injuring the reputation and the business conducted by this plaintiff, caused letters to be mailed to various customers'—

THE COURT: You do not need to do that. I have already called your attention to that.

MR. BALTER: We are reading from two separate paragraphs. You are reading from the paragraph charging the damages. In other words, we have charged a course of conduct libelous to this plaintiff and we have set out one representative letter.

THE COURT: Wait a minute. My view is you may set out a million charges of libel but unless you attribute your damage to them you cannot claim damage because of them. You can show motive and all that, but in your paragraph IX it is a question whether you have not confined yourself to the one letter of 1931.

MR. BALTER: Well, clearly we have not, your Honor. 'That the statements contained in the communications addressed by the defendant, Liquid Veneer Corporation.' Now, if you refer back to paragraph VI we say 'Letters'. We do not say 'Letter'.

THE COURT: Follow that along: 'That the statements contained in the communications addressed by the defendant,**** were false, malicious and untrue, and

(Testimony of Benjamin L. Strauss)

were made only for the purpose of destroying the good name and reputation and business of this plaintiff.'

MR. BALTER: That is right.

THE COURT: 'and that by reason of the said false, malicious and defamatory publication aforesaid', singular. Now, if that is not broad enough to include all of those, because, remember that this is the basis of your damage.

MR. BALTER: Yes, your Honor.

THE COURT: And if it is not broad enough to include those previous ones you can't claim damage on them.

MR. BALTER: I think it is broad enough, your Honor. We are setting out a system by the defendant.

THE COURT: In the absence of a specific objection heretofore made as to what was included, or an analysis of this complaint, I would feel compelled to say that the basis of damage may reasonably be held to include all of the previous letters. Undoubtedly, I think that was the intention.

MR. BALTER: That was the intention.

THE COURT: Overruled. Go on.

MR. BALTER: And no bill of particulars was ever asked for.

MR. SHEEHAN: I will take exception to the Court's statement.

THE COURT: Yes.

MR. BALTER: Mr. Reporter will you be good enough to read the last question which I asked Mr. Strauss?

MR. SHEEHAN: Your Honor, in that connection I would like to call your Honor's attention to this: You see we are not charged with anything else except this.

THE COURT: Do you want to argue this matter again? The Court has ruled.

(Testimony of Benjamin L. Strauss)

MR. SHEEHAN: I am stating a fact, your Honor, because it is a serious matter for us.

THE COURT: Proceed.

WITNESS CONTINUED: This is a bottle of "Liquid Veneer", defendant's product. (Admitted as plaintiff's Exhibit 9.) This is a carton of Liquid Veneer, defendant's product. (Admitted as plaintiff's Exhibit 10.) This is a sample of the product of the plaintiff, "French Veneer" sold at the May Company up to 1928. (Admitted as plaintiff's Exhibit 11.) This is a carton and label of French Veneer, plaintiff's product. (Admitted as plaintiff's Exhibit 12.)

Q: (By plaintiff's Attorney) In your experience there at the May Company over a period of 12 years, when you knew the plaintiff during all that time, were any complaints ever made to you that the public was being confused as to buying one product or the other?

MR. SHEEHAN: I will object to that as irrelevant, incompetent and immaterial.

MR. BALTER: May I have your answer?

A: No, sir.

THE COURT: A moment, please.

MR. BALTER: I am sorry, your Honor. I did not hear that.

THE COURT: Strike out the answer.

After argument the Court overruled the objection, an exception was taken to the answer of the witness to strike out and it was restored.

Q: (plaintiff's attorney) In your experience over a period of 12 years you have known Mrs. Smuckler here and you have been merchandise manager of May Com-

(Testimony of Benjamin L. Strauss)

pany, have you ever had any complaint to you from any customers or any buyers or managers of departments that there has been any confusion in the minds of the public between these two products?

The following objection was made:

"Just a minute before he answers that. I object to that on the ground it is irrelevant, incompetent and immaterial; that the question is leading the witness; that it is calling for the witness' conclusion; and that the date of the letter in which the libel is charged in this complaint is June 2, 1931, and this man is asking over a period of 12 years now from some date or other."

Objection was overruled and exception was noted, and the witness answered, "No sir."

WITNESS CONTINUED: In the 12 years I have known Mrs. Smuckler I have always known where she could be reached, she has not eluded anybody and I have never hesitated to do business with her as a business risk or business credit.

Upon

CROSS-EXAMINATION

the WITNESS TESTIFIED: My relations with Mrs. Smuckler have only been as a tradesman, I do not know her outside of business and belong to no clubs or organizations to which she belongs. French Veneer was in stock up to the year 1928. During the years 1928, 1929 and part of 1930 it was excluded from sale at the May Company and in 1930 there was substituted for it French Polish. During this time she was in business. I, my-

(Testimony of Benjamin L. Strauss)

self, discontinued the sale of her product knowing it was available for sale and did so of my own volition, and we are now selling her product, French Polish. I am the one who suggested to Mrs. Smuckler that she change the name of her product from French Veneer to French Polish. I had no interest in her business but was co-operating with her in a friendly way.

On

REDIRECT EXAMINATION

the WITNESS TESTIFIED: We discontinued the sale of French Veneer for the reason that "we were threatened with litigation".

Q: (by plaintiff's attorney) And why did you suggest to Mrs. Smuckler several years later that you felt that she should restore French Polish?

MR. SHEEHAN: I object to that as irrelevant, incompetent, immaterial and not binding on this defendant.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A: The demand for her polish was great. We had built up a trade and had a customer following. We got calls continuously for her product, and I suggested that she manufacture it under another name.

Q: BY THE COURT: Did I understand you to say that there was a demand for her French Veneer?

A: No, for her—

Q: French Polish?

A. There was a demand for her French Veneer.

Q. There was a demand for her French Veneer?

A: Yes, sir.

(Testimony of Benjamin L. Strauss)

Q: Even at the time you quit using it?

A: Yes, sir.

THE COURT: Yes.

Q: MR. BALTER: And that is why, after it was off the shelves for a year or two, you suggested she restore the merchandise under another name?

A: Yes, sir.

MR. SHEEHAN: I will object to that as leading the witness and calling for the witness' conclusion.

THE COURT: Well, it is leading but it is in redirect, rather a summation and is allowable under such circumstances. I do not think it is a conclusion.

MR. SHEEHAN: Exception.

Q: BY MR. BALTER: Did you ever sell French Veneer in other stores of May Company besides the Los Angeles store?

A: No, sir.

Q: Did you contemplate placing this product in other stores of the May Company?

MR. SHEEHAN: I will object to that as speculative and not binding on this defendant, incompetent, irrelevant and immaterial what he speculated about.

MR. BALTER: Merchandise manager, your Honor.

THE COURT: It is within the legitimate range of possibility, I think. Overruled.

MR. SHEEHAN: Exception.

A: Yes, sir.

Q: BY MR. BALTER: And did you discuss that possibility with Mrs Smuckler at some time?

A: Yes, sir.

MR. SHEEHAN: I will object to that as irrelevant, incompetent, immaterial and not binding on this defendant.

(Testimony of Benjamin L. Strauss)

THE COURT: Overruled.

MR. SHEEHAN: As to whatever conversation he had with Mrs. Smuckler.

Q: BY MR. BALTER: And why did you not place this product in other stores of May Company?

MR. SHEEHAN: I will object to that as irrelevant, incompetent, immaterial, and calling for the conclusion of the witness, not binding on this defendant.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A: Not wanting to buy litigation.

Q: BY MR. BALTER: In other words, your decision had no relationship to the merit of the product, did it?

A: No, sir.

MR. SHEEHAN: I will object to that and ask the answer be stricken out. They did not give me a chance, your Honor. They are trying to get this in the record.

THE COURT: All right. That is true.

THE WITNESS: I am sorry.

MR. BALTER: All right, I will withdraw the question and reframe it.

Q: Did your decision not to place French Veneer in all of the other stores of May Company throughout the United States have any relationship to the quality or value of the product for sales purposes?

MR. SHEEHAN: I object to that as irrelevant, incompetent and immaterial; inadmissible under the pleadings and not binding on this defendant.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A: No, sir.

(Testimony of Benjamin L. Strauss)

MR. SHEEHAN: Exception.

Q: Assuming that, from your experience as a merchandiser for 30 years, and your intimate knowledge of this product and its competitive quality compared with other products of the same type, and your intimate personal knowledge of the plaintiff in a business relationship in your experience with her in the May Company, and assuming that there were no harassment of her conduct, and assuming that no threatening letters were sent to her customers by the defendant, would you say that the plaintiff could have extended her business substantially beyond the bounds that you knew it? I have eliminated that phase of it, your Honor.

Objection was made on the ground it was "irrelevant, incompetent, immaterial and not proper, and that the witness is not properly qualified, that there is no evidence on which to base any such hypothetical question and on the ground that it is opinion evidence calling for the witness' conclusion, and is speculative."

The objection was overruled an exception was noted, the witness testified that she could have increased her business very materially because her product was genuine and she had created a demand for it and had a following after it was sold.

On

RECROSS EXAMINATION,

WITNESS TESTIFIED:

Referring to plaintiff's Exhibit 4 and where it says, "we judge Mr. Strause's reverse decision to take this infringing French Veneer off sale is due to being misin-

(Testimony of Benjamin L. Strauss)

formed", I do not recall that I wrote and reversed my decision. I would have to refer to my letter. I cannot elaborate on that and could not answer without the memorandum. Referring to plaintiff's Exhibit 6, the letter dated April 13, 1931, where it says, "I have your favor of April 9th, stating that when you returned from your vacation you had decided to temporarily discontinue French Veneer demonstration." my recollection is not refreshed as to whether or not the French Veneer demonstration was in my store up to the time when I returned from my vacation, nor when I returned from my vacation. In 1929, 1930 and 1931 the demonstration of French Veneer in our store was on the fourth floor in about the center of the house furnishing goods section, about 75 to 100 feet from the place of the Liquid Veneer demonstration. I do not know in what stock rooms the stock of French Veneer or French Polish was kept, but during the times mentioned no stock was kept. This I know through the want slips system we have.

MR. BALTER: Just one question. Since Mr. Sheehan does not see fit to introduce this letter, I shall ask leave to introduce it. He brought it up himself, your Honor.

THE COURT: Yes, the letter is admissible.

On

REDIRECT EXAMINATION

WITNESS TESTIFIED:

This copy of letter dated April 10, 1929, is a copy of the original letter I sent to Liquid Veneer Corporation.

Over objection of defendant that it was irrelevant, incompetent, immaterial, hearsay, not the best evidence and

(Testimony of Benjamin L. Strauss)

inadmissible under the pleadings, the overruling of the objection and the noting of an exception, the letter was admitted as plaintiff's Exhibit 13, was read to the jury, and is as follows:

"Liquid Veneer Company
Buffalo, New York,

April 10th, 1929.

Attention: Mr. Martin J. Cabana

Gentlemen:—

I wrote you on the 2nd inst. in reference to the French Veneer Mnfg. Co. Since that time Mrs. Lena G. Smuckler and her son have called on me and laid their case before me.

I think that taking this merchandise off sale would be an injustice and personally cannot see where their item is an infringement on yours. The word "Veneer" to my way of thinking is a word that no one has a right to lay claim on as it was used many years before either you or she manufactured your product.

Their Trade Mark was registered in the United States Patent Office on May 5th, 1914. It seems to me that if this was an infringement that this name could not have been registered in the Patent Office. You claim in your letter that you have been unable to locate the owners of French Veneer. Their name has been in the Los Angeles Telephone Book for the past 13 or 14 years. You could always have gotten their address through ourselves or

(Testimony of Benjamin L. Strauss)

from their billing head, had you so desired. Mrs. Smuttler's son, Elijah M. Smuttler is an attorney at law located at 920 Chester Williams Building, Los Angeles, California.

We are going to change our mind and sell French Veneer until such time as you can show us that you have a restraint order restraining Mrs. Smuttler from selling her product.

Yours very truly,

BLS/O

-----"

Q. (by Mr. Balter) Did you ever receive a court order from the Liquid Veneer Corporation restraining you from selling either French Polish or French Veneer?

A. No, sir.

Q. You haven't yet, have you?

A. No, sir.

Q. In spite of all these letters written you?

A. No, sir.

On

RECROSS EXAMINATION

WITNESS TESTIFIED:

Where I state in the letter, "We are going to change our mind and sell French Veneer until such time as you can show us that you have a Court Order restraining Mrs. Smuttler from selling her product" I expressed my opinion of her product and what I intended to do about it.

(Testimony of William E. Max)

WILLIAM E. MAX,

witness for the plaintiff, was sworn and testified, on

DIRECT EXAMINATION:

I am and have been for 12 years buyer of house furnishings at the May Company, in charge of that department. I have known Mrs. Smuckler about 20 years, first meeting her in approximately 1915, at Hamburger's Department Store, where she was demonstrating French Veneer, and which she sold at Hamburger's and the May Company, as I recall it, to the first part of 1929. After we received the letter dated March 27, 1929, plaintiff's Exhibit 2, we discontinued the sale of French Veneer.

Q. BY MR. BALTER: For how long a period of time, do you recall, was the product French Veneer polish taken off the shelves of May Company?

MR. SHEEHAN: I will object to that, your Honor, on the grounds that any transactions with the May Company are absolutely incompetent, irrelevant, and immaterial in this action because the letter which is claimed to be the basis of a libel here is one that is addressed to Young's Market on Eighth Street, under date of June 2, 1931; and on the further ground that any transactions with the May Company or with any other company prior to that date last mentioned would have no bearing upon any of the allegations in the complaint in this action; would be irrelevant, incompetent and immaterial.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: It was taken off sale on receipt of the letter and kept off until 1930, at which time we substituted the French Polish for French Veneer.

(Testimony of William E. Max)

Q: Now, during this period of time between the very early part of 1929 until some time in 1930 was there a demand for French Veneer?

MR. SHEEHAN: I object to that as calling for the witness' conclusion and on all of the grounds previously stated, your Honor.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: There was a continued demand for the product. I suggested that she change the name because of the objections to the words "Liquid Veneer" as we wanted to sell it and because of the demand. I don't want to be considered or thought of as an expert on polishes but from a sales standpoint my girls were instructed to tell the customers if they wanted something for a polishing surface to suggest Liquid Veneer, or if they had dark furniture or furniture that needed scratch covering to suggest French Polish or French Veneer.

Q: BY MR. BALTER: Did you ever receive any complaints from anybody that any such palming off of products was taking place?

MR. SHEEHAN: I object to that on the same ground, and particularly in reference to counsel's statement in the question that is over a period of 20 years.

THE COURT: As relating to the witness' experience in selling to the public, I think it is material and relevant. Objection overruled.

MR. SHEEHAN: Exception.

THE COURT: You may answer it.

(Testimony of William E. Max)

MR. BALTER: Will you answer that question?

A: I might answer it in this way: That it would not be there if there had of been --

THE COURT: The question related to the public reaction. Did you hear any complaint from the public?

A: None that we know of.

THE COURT: No. All right.

WITNESS CONTINUES: During my acquaintance with Mrs. Smuckler I knew where she could be reached at all times.

Upon

EXAMINATION

by the Court, the WITNESS TESTIFIED:

We started selling French Veneer because Mrs. Smuckler called on me to show me the product about 1915, and we continued to sell it until 1929. During this time we knew where we could go and get the product, we had her address and mailed orders to it. She was in the 'phone book and City Directory. We could communicate with her the same as any other manufacturer of products sold in our store.

On

CROSS EXAMINATION

the WITNESS TESTIFIED:

I am no relative of Mrs. Smuckler and have only had business relations. I cannot give you the address of Mrs. Smuckler on May 10, 1932, or say where she lived on February 2, 1935, except by referring to my records. I

(Testimony of William E. Max)

have no recollection whatsoever of where she lived during these periods except by referring to the records. I have known Liquid Veneer Company for a long period of time and that it had a trade mark on the words "Liquid Veneer" was drawn to my attention. Miss Kaster was a demonstrator for the Company and her demonstrations were held on the fourth floor. During this time French Veneer also had demonstrations. I would make the arrangements with Mrs. Smuckler for her demonstrations. She had none in 1929, or 1930, but had one in 1931 because we started selling the merchandise at that time. During 1929, 1930 and 1931, we did not to my knowledge carry any French Veneer in stock in the Paint Department or stock room.

The witness was asked: "Where is the stock room in the May Company?" when discussion took place between the Court and counsel to ask the purpose of such examination and counsel for defendant stated he wanted to prove that the witness and Mr. Strauss were mistaken in the conclusion that there was no French Veneer in the May Company during 1929, 1930 and 1931. The Court asking: "Suppose that it was there or was not there, what relevancy or materiality has it?" Counsel stated, "Well that is the contention I have been maintaining all along, your Honor, that it has no relevancy. But in so much as your Honor has, I believe on those points consistently ruled against me on the admission of these letters and in the admission of this testimony, I thought I would do the best I could to correct it."

THE COURT: The letters and all are admissible as to the case of the defendant, as to the motive of the defendant.

(Testimony of William P. Waddington)

MR. SHEEHAN: Are you limiting it to that, your Honor, only?

THE COURT: No, I am not limiting it to that because the question of damages is involved. I think that your examination is entirely collateral and on an entirely irrelevant matter as to the details of the location of the stock room, for instance. Sustained.

MR. BALTER: I will make the objection, your Honor.

WITNESS CONTINUED: French Veneer was taken off display and out of stock when we received that letter. When the product was in the store it was on display in two places. We have a stock room on the sixth floor and a stock room on the fourth. In most cases fresh merchandise is kept on the sixth floor, excepting for sale and for sale it was put into the paint department as well as in the demonstration.

WILLIAM P. WADDINGTON,

witness for plaintiff, was duly sworn, and testified on

DIRECT EXAMINATION,

I was employed as buyer in the household department of Young's Market Company, the main store Seventh and Union, in 1928, and stayed with them until early in November 1931, as I recall it, and have been merchandising for about forty years. Liquid Veneer was in the department when I went there. French Veneer was put in, as near as I can recall, while I was there in 1928.

The witness was shown a copy of plaintiff's Exhibit 1 and asked if, to his recollection, the letter was received

(Testimony of William P. Waddington)

by him at Young's Market when he was there. The following discussion ensued.

MR. SHEEHAN: Your Honor, I wish to object to that question on the ground that it calls for the conclusion of the witness and that it is inadmissible under the pleadings. There is no allegation in the complaint whatsoever that the letter was ever received by the Young's Market.

THE COURT: Let me have the complaint.

MR. BALTER: We allege it was written to them, your Honor. It is presumed a letter written is received.

THE COURT: The allegation is that the defendant published and caused to be published a letter addressed to Young's Market Company, which letter reads as follows:

MR. BALTER: A presumption of law arises that the letter was received in the due course.

THE COURT: Wait a moment, please.

A: As near as I can recall, this --

THE COURT: Just a minute.

THE WITNESS: Pardon me.

THE COURT: Now, I want to call counsel's attention to the denial of that appearing on page 3 of the answer. '(b) That it denies that at any time, or at all, in furtherance of the plan and/or scheme to injure plaintiff's good name and/or reputation it wrote or caused to be written and/or mailed the letter set forth in said paragraph VI.' Do you think that is a denial, sir?

MR. SHEEHAN: Well, I would say it would be a denial in the terms of the allegations of the complaint. The allegations of the complaint, of course, your Honor, will see, are so framed that it would be very difficult to deny them categorically in any way.

(Testimony of William P. Waddington)

THE COURT: I am not talking about that feature of it. I have just read to you the allegation of the complaint. Now you know that that is not a denial, don't you; that for the purpose of injuring the plaintiff, that is merely a denial that you wrote the letter for the purpose of injuring the plaintiff, but is an admission that you wrote the letter.

MR. SHEEHAN: Well, your Honor, I do not believe I am in any position to deny that this letter was written. Frankly, I do not really know.

MR. BALTER: You said that yesterday, Mr. Sheehan.

THE COURT: That is just exactly what I wanted. Your position, then, is that you will observe the rule that certainly prevails in this Court and in all business or trials of cases that involve business, and when there is an open and evident fact that you will not deny it. This Court and trial has been delayed since the beginning by technical—and I will not describe them otherwise—questioning as to whether this letter was written. Yesterday I had not examined the pleadings but here is a direct admission—not a direct admission, but a failure to deny, I take it. Now, if this letter was written let us have that admitted, and I do not want to hear any more of it during this trial. Proceed.

MR. SHEEHAN: May I explain myself, your Honor?

THE COURT: Yes, sir, you may, but don't make it too long now.

MR. SHEEHAN: Well, it has never been my position that I denied this letter, never has. I did not draw that answer. Other counsel drew it and I understood the answer did admit it.

(Testimony of William P. Waddington)

THE COURT: Do not trouble the Court with that. It is the defendant's answer and you do not need to introduce such suggestions.

MR. SHEEHAN: The only thing, your Honor, that I might state is that I did not have the copy of it and the original was not produced. I do not know what that means, but as to my own knowledge about anything, I have none, and I do not deny what apparently seems to be an obvious composition of this defendant.

THE COURT: I will remember that you made the statement yesterday of your own knowledge that the company did not have a copy of that letter.

MR. SHEEHAN: Your Honor, that I did not have it.

THE COURT: The Court certainly took that as a denial that the letter had been written and your whole conduct was a denial that the letter had been written.

MR. SHEEHAN: I am sorry, your Honor, if I have created that impression. I did not have a copy of the letter.

THE COURT: All right.

MR. SHEEHAN: When they did not produce the original I thought it was at least something as to the inquiry.

THE COURT: Proceed.

Q: BY MR. Balter: When you received this letter was it shown to you by Mr. Young?

A: Yes.

Q: And you read it, didn't you?

A: I read it.

Q: And you acted upon it?

A: Jointly.

(Testimony of William P. Waddington)

MR. SHEEHAN: Just at this point, your Honor, I wish to—and I think I have got to do it in protection of my client's rights—I wish to take an exception to your Honor's remarks in the presence of the jury on that subject.

THE COURT: Very well.

WITNESS CONTINUES: Upon receipt of the letter we immediately took the merchandise out of stock, showed Mrs. Smuckler the letter, and Mr. Young put the letter away in his private files and he has been incapacitated quite a while since. I know that an effort was made to find that particular letter. I have heretofore seen this letter dated September 16, 1931, addressed to Young's Market and signed, Liquid Veneer Corporation, Martin J. Cabana, Vice President.

It was offered into evidence by plaintiff, was objected to as "irrelevant, incompetent, immaterial and inadmissible under the pleadings", objection overruled and exception noted, admitted as plaintiff's Exhibit 14, was read to the jury and reads as follows:

"Gentlemen:—

We can't wait longer for your reply to our legal notice and friendly explanation of our position concerning your selling and offering for sale an infringing product under the name of 'French Veneer'.

Since writing you, the package of so-called 'French Veneer' purchased at your establishment has arrived and is now on the writer's desk, awaiting the attention of our attorneys.

(Testimony of William P. Waddington)

We should be very sorry, indeed, if you made it necessary for us to pass your name to our attorneys together with the evidence, on account of your failure to agree, and advise us at once that you will respect our legal and trade rights.

We are willing to release you at this time from all claims for past infringements and violation of our rights, if you will instantly stop selling, or offering for sale, this infringing product, in violation of our legal and trade rights. In doing this, we consider that we are doing you a distinct business favor and courtesy.

We are not in business to sue people, but to serve them, providing they are willing to respect our legal rights just as we would respect others were our positions reversed.

Our reason why we are anxious to have you understand this situation is that when attorneys get hold of a thing of this kind, they make it their business to start a suit in United States Courts and heavy costs necessarily follow, which costs you will be obliged to pay, besides paying your own attorney fees.

We will await your prompt response. Your silence to our friendly offer will leave us with no alternative but to place the whole matter in the hands of the attorneys.

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."

(Testimony of William P. Waddington)

WITNESS CONTINUED: I have not heretofore seen this letter, dated October 1, 1931, addressed to Young's Market, on the stationery of Liquid Veneer Corporation. I never saw that letter because just at that time I was in another department and I was not very active in the household department. The stamp on the back is that of Young's Market.

MR. BALTER: Well, that is sufficient. I offer this letter in evidence, your Honor, as a letter written to Young's Market Company, on October the 1st, 1931.

THE COURT: Very well.

THE CLERK: Plaintiff's Exhibit 15.

MR. SHEEHAN: The same objections and exception.

THE COURT: Yes, overruled.

The letter was read to the jury and is as follows:

"Dear Mr. Young:—

Your favor of September 22nd is before us. We appreciate fully that you have been erroneously influenced in your discussion with Mrs. Smuckler. We have noticed a desire on the part of these infringers to trouble us in the hope that we will buy out their business.

They know perfectly well that they have, up to this time, apparently found it difficult to make progress satisfactory to themselves. In these days it is difficult to make profits in most all lines but it always has been much more difficult for any one to make profit while infringing on another's rights in the trade.

With reference to your suggestion that the least we could do is to establish our rights through the Courts would say that that is just what we have been trying to

(Testimony of William P. Waddington)

do for a number of years. These folks Smucklers have denied their identity, moved from place to place and made it very difficult for us to pin them down and even obtain evidence against their unlawful practice. In the meantime we found that they were not doing much business but apparently succeeded in interesting your house and one other house in your City.

We decided the way to handle this case is to secure legal evidence against any responsible trader such as your house and start our action against the trader, possibly in joining the manufacturer at the same time. You will understand that our attorney's reason for this is that the Smucklers are not financially responsible, and if we have got to go into Court and litigate the matter, we want to do it with some one who is financially responsible and who can foot the bill of damages. We have been seeking such an opportunity, but the only responsible house outside of your own whom we secured evidence against has discontinued the sale of the infringing so-called 'French Veneer' and we have no alternative but commence our action against your esteemed house if you insist upon aiding and abetting this infringer.

One of our inspectors just a few days ago reported inability to purchase 'French Veneer' at your store. We have already purchased a package from you which we have here as evidence. We now want to know if you have discontinued selling this line or if you intend to continue its sale. We know that you will be frank in

(Testimony of William P. Waddington)

stating your position because you are business people and undoubtedly recognize the necessity of making your definite decision. Please do not misunderstand—we are not arrogant or dictatorial. We are simply seeking to maintain our legal and trade rights just as you would do were our positions reversed.

We will await your prompt response and assure you we would much rather do you a business favor than otherwise.

Yours very truly,

LIQUID VENEER CORPORATION,
Martin J. Cabana,

MJC:BK

Vice President.

P. S. With reference to buying out this infringer. You can state to them for us if you care to that we will spend thousands in defense of our legal and trade rights but would never pay a five cent piece tribute to them or anyone else.

M. J. C.”

WITNESS CONTINUED: The stamp on the back of this letter, dated October 16, 1931, is the receiving stamp of Young's Market Company.

Counsel for defendant objects on the same ground as interposed for the previous letters, the objection is overruled, an exception noted, the letter introduced as plaintiff's Exhibit 16, was read to the jury, and is as follows:

(Testimony of William P. Waddington)

“Young’s Market Co.,
1610 West 7th St.,
Los Angeles, Cal.

Gentlemen:—

Your favor of the 6th is noted fully. There is no further adjustment of this matter to be made so far as our relations with the Smucklers is concerned, or anyone else for that matter, (outside the United States District Courts). We will appreciate your making that clear to the Smucklers, if you care to.

You expressed the belief that the Smucklers are not infringers, yet ask ‘in what way French Veneer is an infringement’. In reply would say any reputable patent attorney will tell you that French Veneer is a flagrant infringement of our trade-mark and trade-name ‘Liquid Veneer’ by using a part of our name. Aside from our legal rights under the trade-mark laws they are guilty of unfair competition, which comes under another law entirely.

They are guilty on two counts and liable for damages for all they have sold in the past, and you, Young’s Market Co. are equally guilty with them as a distributor.

Now, if that be the case, and you wish to continue the sale of French Veneer, we would have no alternative but to commence an action against you in United States District Courts. We just can’t help doing so. Our very business would be at stake were we to consent to your infringing and do nothing to protect our trade-name. It might be construed equivalent to abandonment.

You state that you have not sold any of this product since our first letter and will discontinue its sale until

(Testimony of William P. Waddington)

the matter can be adjusted. We are not clear as to just what you mean by this and will appreciate your making yourself clear to us, because we are stating facts to you just as they are and without any other than the most friendly feelings.

We are going to commence an action against any responsible house who handles this infringing product, We will quite easily have our rights adjusted in Court, because they have already been adjudicated in the United States District Court in Cincinnati, Ohio, in which case the infringing article was called '20th Century Veneer Gloss', and inasmuch as this precedent is established we might not have such a lengthy drawn out case in this instance as we had formerly.

There is no need of your going any further than to consult your own patent attorney to verify our statements. If he wishes, we will be glad to submit Court decree in the matter of '20th Century Veneer Gloss'.

We are trying to save you from difficulty and expenditures. If we must go into Court to settle the matter we are going to demand damages not only for every bottle sold by your Company (which you alone are responsible to us for) but for every bottle manufactured and sold by Smuckler. This is a perfectly natural thing for us to do and which you would do were your position reversed.

Will you please let us have your reply promptly, so that we may know just what procedure we are to take? With every good wish, we remain, meanwhile,

Yours very truly,

LIQUID VENEER CORPORATION,
Martin J. Cabana,

MJC:BK

Vice President."

(Testimony of William P. Waddington)

The Court, stating that he is a bit doubtful about the competency of the letters, ruled that this letter "is not relevant and I want that letter stricken out for the present". It was then offered by attorney for the plaintiff for identification, which was permitted.

EXAMINATION

OF WITNESS CONTINUED:

Q: BY MR. BALTER: Mr. Waddington, when did you take off of the shelves of the Young's Company the product French Veneer?

A: I could not give you the exact date that it was taken off. It was following the receipt of this letter, the first letter introduced.

Q: The first letter that I read? And why did you take it off the shelves?

A: Because of the threat involved in the letter.

MR. SHEEHAN: I object to that and ask that it be stricken out.

THE COURT: Motion denied.

MR. SHEEHAN: Exception.

A: When we took it out of stock upon receipt of that threatening letter it never was put back in, to my knowledge, at least from the time I was there until the end of 1931 and from June 2, 1931 no merchandise of the plaintiff at all was on sale or exhibited at Young's.

Over objection overruled and exception noticed, the witness testified that the product sold exceedingly well. Counsel for plaintiff asked if the witness considered it a good product, if it sold as well as or better than defendant's polish and if there was a larger demand for it than for Liquid Veneer, to which questions objections of the de-

(Testimony of William P. Waddington)

fendant were sustained, the Court stating, "it seems to me that is not at all important as to the relative appeal to the trade of the two products", whereupon,

MR. BALTER: These people claim to have a trade-marked product for 30 years, and here comes a product that outsells them three to one.

MR. SHEEHAN: I object to counsel's statement.

MR. BALTER: If the evidence so shows.

MR. SHEEHAN: I ask the Court to tell the jury to disregard it.

THE COURT: Your statement is improper.

MR. BALTER: I will withdraw it, your Honor.

THE COURT: It should be stricken. Counsel withdraws it. Go ahead.

Q. BY MR. BALTER: As a merchandising man with experience over 40 years, I think you said, Mr. Waddington, and with your knowledge of this product and with your knowledge of how it sold at Young's in comparison with so-called well-established products, would you say that, assuming there were no threats by competitors against the product and it were allowed to develop normally, would you say that the plaintiff's product could be expanded into a large profitable business?

MR. SHEEHAN: Now, don't answer that until I have a chance. I object to that as calling for the witness' conclusion, also his opinion, asking for an opinion of the witness and speculative, and that there is no basis for such a hypothetical question being put to this witness.

THE COURT: I think if the element of threats, etc., perhaps is eliminated, the witness may properly testify from a commercial standpoint as to the prospects of the

(Testimony of William P. Waddington)

probable course of such a product. I think that is entirely proper.

MR. SHEEHAN: Well, your Honor, if a man like that could testify with a great degree of certainty it certainly would be a wonderful commercial instinct to have. He would be a valuable man in any business in the world if he could so predict that. I think it is so highly speculative that it is simply incompetent.

THE COURT: I base it on the fact that here is a witness who has been in commercial lines and in this particular line, cultivating public tastes, no doubt, for a good many years and, therefore, ought to be a judge of it.

MR. BALTER: That is true your Honor.

THE COURT: With that exception, eliminating that part of it, the question will be answered.

MR. BALTER: May I consider you have asked the question, your Honor; you have reframed it better than I could, and require him to answer the question?

MR. SHEEHAN: Exception.

A: Maybe I could answer it best this way: During my experience in marketing polishes of this sort I have never at any time found anything that came onto the market as quickly as this French Veneer.

MR. SHEEHAN: Your Honor, I think I will have to object to that, as to this man making a dissertation on French Veneer and expounding its qualities or its sales ability or anything in connection with the Young's Market as promoting this particular product. I think it is en-

(Testimony of William P. Waddington)

tirely outside the issues of this lawsuit, if there are any issues in it.

THE COURT: Let's see; you are objecting? Was there an objection?

MR. SHEEHAN: I am objecting to the witness' dissertation and explanations.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

THE COURT: Go on, Mr. Waddington.

MR. SHEEHAN: And to his opinions.

A: (Continuing): And over, as I say, such a short period of time; and at the time we received this threatening letter our sales on French Veneer were far out-selling any other polish that we had in the house, and it just was like cutting it off with a knife; it stopped all at once as a result of this letter.

MR. SHEEHAN: Now, I object to that and ask that it all be stricken out.

THE COURT: Motion denied.

MR. SHEEHAN: The witness characterizing as to how it affected him on his business.

THE COURT: Further questions?

MR. SHEEHAN: Exception.

WITNESS CONTINUED: After a demonstration we liked and purchased Mrs. Smuckler's polish and during the period we marketed it we had no difficulty in locating her by 'phone or mail when we needed polish we would either send a formal order to her or call her on the 'phone and the polish was promptly delivered.

(Testimony of William P. Waddington)

ON

CROSS-EXAMINATION

THE WITNESS TESTIFIED:

My statement is intended to be that we took French Veneer off sale after receipt of this letter dated June 2, 1931. I am not prepared to say when the merchandise was taken out of the house. When plaintiff's Exhibit 14, letter of September 16, 1931, was received I was busy reorganizing another department at the time and I know nothing about that purchase at all. The only knowledge I have is for the period between June 2, 1931, and the latter part of 1931. To my knowledge Mrs. Smuckler did not, during this period, have a demonstration in our market.

On

REDIRECT EXAMINATION

the witness testified:

As far as I know, from June 2, 1931 until November 1931 when I left Young's Market no French Veneer was sold at Young's. I will modify that because as I said a moment ago from memory up until possibly the first of September. After the first of September I was not very active in the department so I did not attempt to see what transpired in the way of retail sales. I don't know. But the instructions were positive that we were to sell no more French Veneer. They came not only from me but also from Mr. Young. We took it off the shelves the day we received the letter, even before it was answered.

(Testimony of C. F. Curtis—Winifred M. Jacobs)

C. F. CURTIS,

Witness for plaintiff, was duly sworn and on

DIRECT EXAMINATION

testified:

I am the Chief Clerk of the Southern California Telephone Company and have examined the Telephone Directories and card indexes with respect to Lena G. Smuckler, K. Smuckler and the French Veneer Manufacturing Company. The furthest back any of these names appears in the Directories is January 1916, and thereafter continuously to the present time.

On

CROSS-EXAMINATION

the WITNESS TESTIFIED:

The names of "L. Smuckler, K. Smuckler and French Veneer" appeared in different directories. Part of the service was under "L. Smuckler", part under "K. Smuckler", and "French Veneer" was in the classified advertising. There were about five different addresses during this time.

WINIFRED M. JACOBS,

witness on behalf of plaintiff, was sworn and on

DIRECT EXAMINATION

testified:

About nine years ago I first bought French Veneer at the May Company and purchased it from time to time since then until a few years ago when I went in and they told me they did not carry it any more.

(Testimony of Winifred M. Jacobs)

She was asked by plaintiff's counsel, "And did you recently attempt to buy French Veneer?", and the witness stated, "A week ago last Saturday I was going to the May Company and I saw a demonstration—"; counsel for defendant objected to this as "irrelevant, incompetent, immaterial and in no way binding upon the defendant nor within the issues of the pleadings as to what this woman could do", that "it was not within the elements of a libel, is purely speculative on the part of the witness and entirely without the issues of the case." Counsel for plaintiff replied the purpose of the testimony was to show sales resistance by the public to plaintiff's new product "French Polish", and that this could go to the question of damages that the plaintiff sustained because of the libelous actions of defendant and should be considered by the jury in assessing actual and punitive damages. The objection was overruled, an exception noted, and the witness testified that when she recently asked for French Veneer she did not obtain it but French Polish was offered to her, which she first refused to buy but did later buy when Mrs. Smuckler told her that it was the same as French Veneer and that she had had to change the name.

On

CROSS-EXAMINATION

the WITNESS TESTIFIED:

A long number of years elapsed between her purchases.

(Testimony of Lena G. Smuckler)

LENA G. SMUCKLER

was called as a witness in her own behalf, was duly sworn and on

DIRECT EXAMINATION

testified:

I was born in St. Paul, Minnesota, and will be 60 years old the 14th of next March. I moved to Portland, Oregon, in the early part of 1910, and began to make a furniture or automobile polish and to canvass it in Portland. After about a year Meyer & Frank Department Store permitted me to hold a demonstration. At that time I did not have a name for the product. I went to the State Fair and because I had always wanted to give it a French name, when one of my neighbors to whom I gave some, said "That is a wonderful veneer", I called it French Veneer.

The witness identified a Certificate of Award of the Oregon State Board of Agriculture, dated October 14, 1913. Over defendant's objection that it was "irrelevant, incompetent and immaterial, and not within the issues of this lawsuit", it was admitted as plaintiff's Exhibit 17, and to which exception was taken. She then identified two more Certificates, both being diplomas from the Oregon State Board of Agriculture, and being in 1912 and 1914. Over defendant's objection on the same ground as to Exhibit 17, the diplomas were admitted as plaintiff's Exhibits 18 and 19, and an exception was noted to the overruling.

She then testified that while she was in Portland and after she had taken the name "French Veneer" she had

(Testimony of Lena G. Smuckler)

never heard of "Liquid Veneer", before she came to Los Angeles she did business in Portland with Meyer & Frank's Department Store and Lippman & Wolf, Olds, Wortman & King, she could not name them all but she had all of the big stores, that she had a nice business in Washington. Over an overruled objection that the following testimony was incompetent, irrelevant and immaterial an exception was noted and she stated: Her husband was ill and did not at that time support the family, that she was supporting the family of herself, husband and five children and her only income was from this source of business. Before coming to Los Angeles she made one trip there and sold to Hambergers, which is now the May Company. She came to Los Angeles in 1915, had a demonstration and was in there about a year when Hamburgers received a letter from Liquid Veneer people and they came to her and told her she could not sell her French Veneer. About a year and a half after she came to Los Angeles she first heard from the Liquid Veneer Corporation, that being the latter part of 1917. She saw the letters Liquid Veneer Corporation was writing to her customers and her business started to dwindle down.

She further TESTIFIED: "I used to travel on the road and made all of the Cities and territories. I had Oregon, Washington and California. I could not give you the exact amount of customers but I had close on, you might say, 2000 customers up and down all these States and when they started getting these threatening letters my business just fell down to practically nothing. It just kind of made me heart sick and so I decided to stay right in California and then when the California customers got these letters they fell off one at a time. Before these

(Testimony of Lena G. Smuckler)

customers began to fall away, for years I used to have a mail order business in California of between 25 to 50 letters a day, most of them having checks with the order. I have here a card index representing a partial list of customers during 1920, 1921 and 1922. I had more records but a fire in my garage some time between 1921 and now destroyed most of my records. After I came to Los Angeles I had no other means of support except my income from this French Veneer polish. (This is over objection that it is incompetent, irrelevant and immaterial, which was overruled and exception noted.)

Q: BY MR. BALTER: All right, you tell the Court and Jury the extent of your business for the first few years that you came here, first.

MR. SHEEHAN: I will object to that on the same grounds, that it is irrelevant, incompetent and immaterial; inadmissible under the pleadings and no proper measure of damages in this case.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A. I would take it about a little more or a little less than about a thousand dollars a month.

Q: BY MR. BALTER: A thousand dollars a month. Now, how long would you say you—

MR. SHEEHAN: I will ask that be stricken out on the ground that it is a speculation and it is a mere hazard and a guess, no record to prove it.

MR. BALTER: She has stated that her records were burned.

THE COURT: Overruled. Motion denied. Go on.

MR. SHEEHAN: Exception.

(Testimony of Lena G. Smuckler)

Q: BY MR. BALTER: That would be approximately ten or twelve thousand dollars a year. What was the cost of your merchandise on each sale?

MR. SHEEHAN: I will object to that on the same grounds, your Honor.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A: Ten percent.

Q: BY MR. BALTER: In other words, do I gather that the product which you sold for 50 cents cost you 10 cents to manufacture?

A: Yes, sir.

MR. SHEEHAN: I will object to the form of that question, as to what the counsel gathers from what she is testifying.

MR. BALTER: I was trying to get her answer.

THE COURT: The form of your question seems to be a little irregular.

MR. BALTER: I will change the form, your Honor.

Q: BY MR. BALTER: What did the product which you sold for 50 cents actually cost you?

MR. SHEEHAN: I will object to that as not the proper measure of damages under any rule of damages.

THE COURT: Do I not understand that the witness has testified that she took in something like a thousand dollars a month?

MR. BALTER: That is right.

THE COURT: What did it cost her to do the business, to manufacture her product?

MR. BALTER: All right, put it that way.

A: To manufacture?

(Testimony of Lena G. Smuckler)

THE COURT: Yes, and to do the business that you did; what did it cost you for that thousand dollars a month, how much on an average?

MR. SHEEHAN: I wish to take exception to that.

A: On an average it would cost me about \$400.

Q: BY THE COURT: On an average?

A: Yes, sir.

MR. SHEEHAN: I will ask that the answer be stricken out.

THE COURT: Motion denied.

MR. SHEEHAN: Exception.

Q. BY MR. BALTER: Does that mean all your expenses for living expenses, or just to manufacture the product?

A: That was just to manufacture the product.

Q: Then, do I understand you to say that you netted about \$600. a month?

A: Yes, sir.

MR. SHEEHAN: I object to that as calling for the witness' conclusion.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: I continued to obtain my principal source of income from it "until the year 1931. 1929 is when it dropped most and then in 1931 I had lost practically all and I had to depend upon my sons to support me. Until that time I obtained a substantial income from this business."

Q: BY MR. BALTER: After 1929, when the first letter was written to May Company, did your business fall off then?

A: Yes, sir.

(Testimony of Lena G. Smuckler)

MR. SHEEHAN: I object to that as irrelevant, incompetent, immaterial under the pleadings.

THE COURT: Objection overruled.

MR. SHEEHAN: Exception.

THE COURT: Answer the question.

A: Yes, sir.

THE COURT: You have already answered it.

Q: BY MR. BALTER: To what extent?

MR. SHEEHAN: Same objection.

A: to almost nothing.

MR. SHEEHAN: Save an exception.

A: I had to depend upon my sons to support me and also my home.

WITNESS CONTINUED: I sent out a communication to my customers with reference to the Liquid Veneer Corporation. "From the year '19, 1920, to about '28, I enclosed with every order a circular stating I had nothing to do with any other concern, that I sold French Veneer only". I made an attempt at the May Company to have them handle my product in all of their stores but this was never done. I saw the letter dated June 2, 1931, addressed to Young's Market, plaintiff's Exhibit 1.

Upon

CROSS EXAMINATION:

In 1920 and 1921 I had a large list of customers and on September 18, 1920, I filed a voluntary petition in bankruptcy and my son, Elijah Smuckler, listed himself as one of my creditors. At the bankruptcy sale I purchased back the assets. My husband had been ill for a number of years and he wanted me to sign over my business to

(Testimony of Lena G. Smuckler)

him under the community property law of California, which I refused to do, and that is why I went into bankruptcy. I never looked for a financial rating in any of the Mercantile Agencies, I never asked for any credit. I never filed an income tax return of any kind, State or Federal. I had exemptions I could claim under an income tax.

The Court then questioned the Witness. After an objection to a question by the defendant the Court stated, "it will be deemed that you have a specific objection to each question and exception. Overruled." The witness then testified: I cannot say how much business I did in 1928 because I haven't the records. My gross business, that is the amount I was receiving altogether from my manufacture and sale of French Veneer, in the year 1928, was "approximately between \$300 and \$400 a month, and then in 1929 it had fallen down and in 1930 to 1931 it had almost completely fallen down." I had no other source of income. When I first came here from Portland I lived in a 12 room home with a three car garage and I manufactured my product in the garage. From 1920 to 1923 I had a store on Pico Street. In 1927, 1928, 1929 and 1930 I lived at 311 South Cloverdale, where I lived for six years. I made my product at that place in my garage. I always made my product on the premises where I was living except when I had the store on Pico Street. I did not live there. Other retail stores than Young's Market and the May Company handled my product. I traveled all over and made regular trips to all of the Southern Counties of California. I did this "up until the year of about 1930—1929 and 1930, and then when I would go out and these customers would say, 'I can't buy', I just lost heart

(Testimony of Lena G. Smuckler)

in it and I just quit because it is an expense to travel when you are not making anything". Since my sales ceased I have supported myself by changing the name of French Veneer to French Polish and have also added a silver metal polish which I am now demonstrating. I am still in business.

Counsel for defendant asked if she did not know that after 1929 all business fell off after the beginning of the depression, to which she replied that she did so know and knew that it was still continuing.

On

REDIRECT EXAMINATION

she stated she did not contribute the complete stoppage of her business in 1929 and 1930 to the general depression.

The witness was excused and the following proceedings took place:

MR. BALTER: With respect to the letters in the file on the stationery of Liquid Veneer Corporation and signed by Martin J. Cabana, other than Exhibit 1, which is the copy, namely, Exhibits 2, 4, 5, 6, 7, 8, 14, 15 and 16, we desire to direct your Honor's attention to the affidavit of Martin J. Cabana on file in this case, filed May 2, 1932, in which he says:

"MARTIN J. CABANA, being duly sworn deposes and says that he is a resident of the City of Buffalo, County of Erie and State of New York, is executive vice president of Liquid Veneer Corporation, Defendant above named," and we wish to direct your Honor's and the jury's attention to the signature on that affidavit, subscribed and sworn to before a notary, "Martin J. Cabana."

(Testimony of Lena G. Smuckler)

THE COURT: You want to place that in evidence?

MR. BALTER: I want to place that in evidence as a plaintiff's exhibit, to be examined by the court and jury as a specimen of the signature of Martin J. Cabana to the letters which I have just specified.

THE CLERK: That will be Plaintiff's Exhibit 20.

MR. BALTER: For the purpose of authenticating the signature on those letters.

THE COURT: It will be deemed admitted prior to the introduction and offer of the letters.

MR. BALTER: Yes, your Honor.

THE COURT: Very well. Anything further?

MR. BALTER: That is all, your Honor.

Whereupon the plaintiff rested her case.

Counsel for defendant stated he would like to make a motion and suggested excusing the jury. The jury was thereupon retired and the following proceedings were had out of their presence and hearing:

MR. SHEEHAN: Your Honor, at this time I make a motion for non-suit on the ground that the plaintiff has failed to establish any cause of action whatsoever against the defendant, and particularly has failed to establish any cause of action alleged in the complaint; and on the further ground that the complaint fails to allege a cause of action against the defendant. And on those points I call your Honor's particular attention to the fact that the letter set out in the complaint under June 2, 1931, is addressed to the Young's Market and that it appears from the letter itself and from the evidence which has been introduced that the Liquid Veneer Corporation, a manufacturer of a polish called Liquid Veneer had business rela-

tions with the defendant Young's Market, and that the communication on its face shows that the Liquid Veneer Corporation was a party interested in the subject of the communication, and that the communication was sent to a distributor who is and was likewise interested; that, on its face it is a communication in the trade from one party to another concerning their business relations and that the plaintiff is not named in the communication; and that there is no allegation in the complaint in any way which alleges that this complaint or this letter was written of and concerning Lena G. Smuckler, nor is there any evidence in the case which connects this letter with Lena G. Smuckler, the plaintiff in this action. And further, there is nothing in the letter and nothing in the complaint which shows that this letter in question, directed on its face to Young's Market, was ever brought to the attention of anyone in the Young's Market who knew that it referred to Lena G. Smuckler, the plaintiff in this action; that at no place in the letter is the name of Lena G. Smuckler appearing as a party referred to in any respect and, in fact, it appears from the face of the letter itself that the writer did not know who Lena G. Smuckler was because it appears that the party referred to often as "French Veneer" is referred to in the masculine gender.

(Further argument and discussion of counsel omitted from transcript.)

In the course of defendant's argument for non-suit, counsel for plaintiff moved "that the complaint be amended in Paragraph VI to the effect that the letter was intended to refer to the plaintiff, Lena G. Smuckler."

MR. SHEEHAN: Of course, I will have to object to that, your Honor, at this stage of the proceedings when the case is closed.

MR. BALTER: It is not damaging you in any way.

MR. SHEEHAN: It is not?

MR. BALTER: You knew what this case was for three years.

THE COURT: Well, the motion is granted, but I want you to file an amendment. I will not take the course done before. You file an amendment as soon as you may, re-alleging Paragraph VI.

MR. BALTER: Alleging that it refers to the plaintiff, Lena G. Smuckler.

MR. SHEEHAN: I will object to it and take an exception.

THE COURT: A moment. Exception to the defendant.

Further argument was then had on the motion for non-suit and thereupon the Court took the Motion under submission, stating:

"Very well. I will not pass upon this motion. I am fairly sure that the motion will be overruled. However, I prefer to study a certain phase of the objection, but it will stand submitted and if you have only one witness we will finish up with him and finish the evidence now. That is as far as we will go tonight, anyhow."

Counsel for defendant then moved the Court to amend the answer to allege that the communication "is a privileged communication by one party having an interest to another party having an interest, and that it is a communication in trade." Over objection and exception permission to amend was given counsel to file an amendment.

The jury was then returned into the Court Room and the following proceedings were had in their presence and hearing.

(Testimony of Erna M. Kaster)

ERNA M. KASTER,

witness in behalf of defendant, being sworn, testified on

DIRECT EXAMINATION

as follows:

I have been employed at the May Company since 1921. Since 1926 I have been working for the Liquid Veneer people, and it pays me. I am saleslady and demonstrator at the May Company, selling the May Company's merchandise and demonstrating Liquid Veneer. The Liquid Veneer I demonstrate is the property of the May Company. To my own knowledge, during 1929, 1930 and 1931, French Veneer was on sale at the May Company. The labels on the polish were changed in 1933, after I was summonsed to Court here at that time. Prior to that time the labels had not been changed. I saw Mrs. Smuckler make the change. At various intervals during the years 1929, 1930, 1931, 1932 and 1933 Mrs. Smuckler demonstrated French Veneer at the May Company. These demonstrations were on the same floor as the Liquid Veneer, were visible, and I saw them. During these demonstrations she would sell her French Veneer. When our stock of Liquid Veneer runs low we take a stock sheet to Mr. Max, the buyer, he gives it an O. K. and it is then turned over to the girls in the office, they write up the orders and send them in to Buffalo. The goods are then shipped from Buffalo to the May Company. Some comes by boat and by fast train. If I am sort of short they are

(Testimony of Erna M. Kaster)

run by fast train or routed through San Francisco. All of this Liquid Veneer stock comes from Buffalo by these various methods. The Liquid Veneer business fell off very much subsequent to 1929. I observed the sales of French Veneer, subsequent to the year 1929, fell off too; they all fell off, the business of the whole department.

On

CROSS-EXAMINATION

the WITNESS TESTIFIED:

Mrs. Smuckler and I sell competing products. There is no ill feeling between us. I believe it was after 1933, in that Fall, that Mrs. Smuckler changed the labels and French Polish was sold in place of French Veneer. I heard the reading of the letter of Mr. Strauss, signed April 2, 1929, in which he says from that day on he would discontinue the sale of French Veneer but he never did. It was sold and kept in stock until Mrs. Smuckler changed the labels. She put a sticker labeled "Polish", over the word "Veneer" so that it read "French Polish". Now she has different labels, she doesn't have to paste them on now.

I testified at a previous hearing in this case that certain orders were routed through San Francisco, but it was never billed from San Francisco, but always from Buffalo. The merchandise which comes to the May Company actually comes from Buffalo.

Counsel for defendant offers into evidence Trade-mark No. 56782 issued on "Liquid Veneer" on October 16, 1906, and renewed on the 22nd day of June, 1926, to Liquid Veneer Corporation, which was admitted as defendant's Exhibit "B", whereupon defendant rested, counsel stating he had his instructions and the exceptions to the instructions ready for the Court. The Court thereupon adjourned to May 9, 1935. On that day, out of the hearing of the jury and in their absence, the following proceedings took place. Counsel for plaintiff opposed the filing of defendant's amendment to Answer on the ground that it sets up evidentiary and argumentative matters and stated, "For the purpose of the record, your Honor, I want to move to strike the Answer from the files and have a ruling on that.

THE COURT: Motion denied.

MR. SHEEHAN: Mr. Balter, there is a trade-mark—

The COURT: You had better take an exception to that, Mr. Balter.

MR. BALTER: Isn't that the same thing you introduced? Yes, I will take an exception, your Honor. Is that the same thing introduced?

Trade-mark Certificate of the Liquid Veneer Corporation was admitted as defendant's Exhibit.

Over defendant's objection and exception the Exhibits introduced on the hearing of Motion to Quash, on May 13, 1933, were introduced into evidence as plaintiff's Exhibits 21 to 32 inclusive, and being as follows:

Nature of document	Dated	Exhibit No.	
		on Motion to Quash	Exhibit No. at trial
Invoice	7- 7-32	1	21
Invoice	7-18-32	2	22
Frts. Bill	7-12-32	3	23
B/L	4-13-32	4	24
B/L	4-16-32	5	25
Frts. Bill	4-18-32	6	26
Invoice	2-16-33	7	27
Invoice	2-17-33	8	28
Invoice	4-30-30	9	29
Invoice	3-20-31	10	30
Photocopy			
Frts. Bill	5- 1-30	11	31
Photocopy			
Frts. Bill	3-14-31	12	32

Counsel for plaintiff then states:

“At this time, your Honor, I would like to make a motion for a directed verdict for the plaintiff on the following grounds: That the letter is libelous per se as a matter of law, inasmuch as, without extrinsic evidence, if it is read by itself, it tends to injure the plaintiff in her business or occupation, according to the well-established law involved; that if, as we believe, it is a libel per se as a matter of law, malice is presumed and some damage is

presumed. The burden of proof is on the defendant to prove that the allegations made in its letter are true. The falsity of the charges are presumed. There is absolutely no evidence in the record on the part of defendant that the charges made in the letter are true. In fact, we have even ourselves assumed the burden, your Honor, of showing they are false. The only thing in the record which the defendant has at all besides this answer, which, as I have cited to you in the case of Peterson v. Rasmussen definitely states must be proved, the privilege."

The Court denied the motion, allowing exception to plaintiff.

The evidence being all in and the case closed, counsel for defendant renewed his Motion to Dismiss and stated:

"I want to renew my motion now, Judge. At this time, as I understand it now, the case being all closed, I will renew my motion to dismiss the plaintiff's complaint on all the grounds heretofore stated in my original motion; and on the additional ground that there is now nothing before this Court which would entitle the—there is no additional evidence since my motion or anything else being before this court which would entitle the plaintiff to maintain the action alleged in the complaint, or any cause of action whatsoever."

The motion was denied and exception to defendant noted.

Respective counsel had heretofore submitted to the Court proposed instructions to the jury and each had submitted to the Court exceptions to certain instructions proposed by the other.

The instructions proposed and requested by defendant are as follows:

I

You are directed to return a verdict in favor of defendant.

In case the court refuses to give the foregoing instruction, then, and in that event only, the defendant requests each of the following instructions:

II

Passion, prejudice and sympathy have no place in your considerations or in your deliberations. The fact that the defendant is a corporation cannot and must not be considered by you. It is entitled to *submitted proposed instructions to the jury and each had submitted exceptions to certain instructions proposed by the other. The instructions proposed and requested by defendant are as follows:*

I

You are directed to return a verdict in favor of the defendant.

In case the Court refuses to give the foregoing instruction, then, and in that event only, the defendant requests each of the following instructions:

II

Passion, prejudice and sympathy have no place in your considerations or in your deliberations. The fact that the defendant is a corporation cannot and must not be considered by you. It is entitled to

the same fair treatment and the same consideration at your hands as a private individual, no more and no less.

It is your duty, without sympathy, prejudice or passion, to calmly consider the evidence and upon a consideration of the evidence and the law applicable thereto render your verdict. In considering the evidence and attempting to determine the truth of the matter in controversy, you should not be influenced by sympathy for the plaintiff or prejudice against the defendant, nor by the fact that the plaintiff is a private individual and the defendant a corporation. It is your duty to base your verdict solely and entirely upon the evidence and the law as I have given them in these instructions.

III.

The defendant in this case is charged by the plaintiff with libel. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Therefore, in order to recover, the plaintiff must prove by a preponderance of the evidence that the defendant published (1) a false statement, (2) which was not privileged and (3) which exposed the plaintiff to hatred, contempt, ridicule or obloquy, or which caused her to be shunned or avoided or which had a tendency to injure her in her occupation. If plaintiff fails to prove by a preponderance of the evidence that the statements in the alleged libelous communications were false or that they exposed the plaintiff to hatred, contempt, ridicule or obloquy, or caused her to be shunned or avoided, or which had a tendency to injure her in her occupation, then your verdict must be in favor of the defendant.

IV.

The Court instructs you that, as a matter of law, communications relied on by plaintiff in this action are privileged communications and that, therefore, plaintiff cannot recover unless she proves by a preponderance of the evidence that said publication or publications even though false were sent out by the defendant with malicious intent. Malice is a desire and disposition to injure another founded upon spite or ill will. Therefore, if you should find that the alleged publications even though false were not founded upon enmity to the plaintiff but were made with the sole desire on defendant's part to protect its own interests, then your verdict must be for the defendant.

V.

Malice cannot be inferred from the mere sending of the letters relied upon by the plaintiff in this case and plaintiff, in order to recover, must prove that the sending of said letter or letters was motivated by spite or ill will by the defendant to the plaintiff.

VI.

If you find the statements in the alleged libelous publications to be true, then your verdict must be in favor of the defendant. In this connection, the letters relied upon by plaintiff state that plaintiff was infringing its registered trade-mark. You are instructed that, if defendant honestly believed that plaintiff was an infringer, said statements were and are not libelous.

VII.

In civil cases a preponderance of evidence is all that is required and by "a preponderance of evidence" is meant such evidence as, when weighed with that opposed to it,

has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

VIII.

The fact that I instruct you upon the measure of damages which the plaintiff is entitled to recover is not to be taken by you as an intimation that I either believe or do not believe she is entitled to recover damages. It is my duty to instruct you fully upon the law governing every issue in this case. The instructions upon the measure of damages are given you to guide you in fixing the damages which plaintiff is entitled to recover only in the event you believe from the evidence and the instructions I have given you that the plaintiff is entitled to recover. The giving of such instructions is no indication that the Court believes or does not believe that the plaintiff is entitled to recover. That is a question for your sole and exclusive determination upon the evidence and the instructions which I have given you. If you determine that the plaintiff is entitled to recover, then you are to fix her damages in accordance with the rules which I give you. If on the other hand you believe from the evidence and the instructions I give you that the plaintiff is not entitled to recover, then the plaintiff cannot recover and it is your duty to lay aside entirely the question of damages she is entitled to recover and the instructions given thereon and return your verdict against the plaintiff and in favor of the defendant

IX.

You are instructed that plaintiff may only recover for damages flowing directly and proximately from the publication of that certain letter from the Liquid Veneer Corporation to Young's Market, dated June 2, 1931, and you cannot assess damages against the defendant for any damages resulting to plaintiff from any other letters or any other alleged libelous publications.

X.

In assessing the actual damages sustained by plaintiff you are not to indulge in speculation but you will assess the actual damages in such an amount as will fully and fairly compensate the plaintiff for any injury suffered by her by reason of the acts and things alleged in the complaint.

XI.

You are hereby instructed that the defendant's trademark "Liquid Veneer" is a valid trademark and that the use by the defendant of the word "veneer" is an infringement thereof.

Both parties having rested, having submitted proposed instructions and exceptions to those proposed by the other, having made motions at the close of the evidence, one for a non-suit and the other for a directed verdict, and each having been denied and exceptions noted to each and the cause being ready for submission to the jury, the following charge was given.

COURT'S CHARGE TO JURY.

THE COURT: As you know, gentlemen, the action is one for damages following or as the result of the sending of a letter. I will not read the letter. I may have occasion to refer to one or two sentences in it. The law of California with respect to this matter is that libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

Further, with respect to the two qualities that it must possess, that is, falsity and unprivileged, it is not necessary to tell you what "false" is, of course. You know that.

Under the law an unprivileged communication as applied to this case is a communication made without malice. If malice exists then privilege cannot be claimed. "To a person interested therein," that is, interested in the communication. It might reasonably be said that the Young Company or The May Company—the Young Company this letter was addressed to, I believe,—was interested in the subject. "By one who is also interested." That would be the Liquid Veneer Corporation. "Or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent or was requested by the person interested to give the information." In other words, if this were a legitimate trade necessity, a legitimate communication from one business house to another and written in good faith and everything true in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good

faith, though it be true, it is not privileged. IF it is false, though it otherwise agrees with the definition of "privilege", it is not privileged.

Now, taking the communication itself you can pass upon that, I think, without any very great difficulty. In one paragraph of it it says: "We have had more or less difficulty with these people * * *." I will say further at this point that the communication must refer to the person claiming to be injured, and in this case the complaint charges that the plaintiff in the action was the one referred to in the letter. I do not know whether that is denied or not. I will assume that it is denied in the answer, but you must find from the evidence that the letter did refer to the plaintiff here.

It goes on to say: "We have had more or less difficulty with these people who manufacture this so-called 'French Veneer',"—you may draw your conclusion from that as to whether this plaintiff was referred to. "have tried to purchase evidence against them individually." I suppose, meaning that they tried to buy their product from them, from the manufacturer of French Veneer to be used as evidence, "but they moved around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation."

Now, gentlemen, consider seriously whether those statements are true. You are at liberty to and should contrast that with the statement of the witnesses here that the telephone of this woman was in the telephone *of this woman* *was in the telephone* directory throughout the time. I think the representative of the Young store said he had never any difficulty—in fact, both witnesses stated they

had never had any difficulty in finding her. And you will thereupon conclude whether that is a true statement.

Speaking again of the manufacturer of French Veneer, the letter goes on to say:

“His object for adopting the name ‘French Veneer’ is obvious. He is trying to trade on our rights.”

That, I think, as counsel stated, if a fact, is a criminal offense and infringement under the federal statutes. Infringement of an interstate trade-mark may be punished criminally.

Now, having all of those things in mind, you will make up your minds whether this exposes the plaintiff to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business.

As a matter of fact, a substance which is of general knowledge, like wood, iron, paint, that in and of itself is not the subject of the exclusive appropriation of anybody as a trade right. You sell a certain kind of flour or a certain kind of oatmeal or what not, naturally, of course, nobody can claim an exclusive right in a generic name of a well-known material exclusively. The combination only may be appropriated. The right in a trade-mark is based upon the tendency to deceive the public; that one will sell his own goods to the public intending and under conditions where the public believe them to be the goods of someone else.

Repeating somewhat of what I have said before, the defendant in this case is charged by the plaintiff with libel. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to

the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Therefore, in order to recover, the plaintiff must prove by a preponderance of the evidence that the defendant published, first, a false statement, second, which was not privileged, and third, which exposed the plaintiff to hatred, contempt, ridicule, or obloquy, or which caused her to be shunned or avoided, or which had a tendency to injure her in her occupation.

If the plaintiff fails to prove by a preponderance of the evidence that the statements in the alleged libelous communication were false or that they exposed the plaintiff to hatred, contempt, ridicule, or obloquy, or caused her to be shunned or avoided, or which had a tendency to injure her in her occupation, then your verdict must be in favor of the defendant.

The plaintiff must, as suggested there, establish her case by a preponderance of the evidence. You are not, of course, to be controlled by your emotions. No jury should do that. You are not in passing upon this case to be influenced by feeling, by prejudice, or by sympathy, but you must find and be governed only by your finding as to what the facts are.

Now, with reference to the various letters that were offered in evidence other than the indictment letter—I should not say “the indictment letter”. I mean the letter that is pleaded and upon which the damage is based. You cannot base your damages or verdict for damages, in the event you should find damages, on any of those letters. And in that respect, gentlemen, when I use the term “damages” I am not intimating to you an opinion that damage

has been suffered or that you should return a verdict in any way.

They are offered and were offered for the purpose of showing malice. If they show or tend to show a continual desire or intention on the part of the defendant to injure the plaintiff, then you may consider them. That is their purpose, and not for the purpose of showing damage, as is the letter which has been pleaded in the complaint.

With respect to damages the law provides that for the breach of an obligation not arising from contract—that in this case, what the plaintiff claims to be—the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. In other words, the damages must be such, in the event you should find a verdict for the plaintiff, that are proximately, that is, directly, caused by the acts of the defendant.

In addition thereto, however, gentlemen, the law in this state and, I guess in every state, provides for what are known as exemplary damages that mean something different from actual damages.

In an action for the breach of an obligation not arising from contract, such as is charged in this case, where the defendant has been guilty of oppression or fraud or malice—and in this case it would mean express malice—the plaintiff in addition to actual damages may recover damages for the sake of example and by way of punishing the defendant.

If, now, you think that this method used by the defendant was engendered and rested in the purpose to destroy the business of the plaintiff, was done and made with ill-will toward the plaintiff, or accompanied and did

itself consist in an act of oppression, then you are at liberty to award exemplary damages; that is, exemplary as opposed to compensatory, meaning damages that are to reimburse for actual loss suffered, and you may award exemplary damages, that is, damages by way of example.

You take the case with you. You are not controlled by any opinion that the Court directly or inferentially may have expressed. You are not to be governed by passion nor prejudice, but consider the case carefully, gentlemen, and if, in the event you find for the plaintiff, you may consider those two features and fix the amount at such as you think in the one case she has actually suffered, and in the other case that she should be awarded by reason of and in the way of exemplary damages.

Defendant excepted to portions of the Court's Charge as follows:

MR. SHEEHAN: Your Honor, I believe your Honor mis-spoke when you first addressed the jury and you said "unprivileged" when your Honor really meant "privileged." In your definition of the privileged communication, that it is a communication by one person having an interest in the matter to another person having a like interest, that is, between two business houses, and I think your Honor misspoke on that.

THE COURT: I read the section. That ought to be good enough.

MR. SHEEHAN: You did, but you misspoke yourself, your Honor, as I recollect it.

I wish to except to your Honor's failure to give each instruction submitted by defendant; and also except to all plaintiff's proposed instructions in so far as those were given.

I then wish to except to that part of your Honor's charge in which you stated that in a privileged communication that if the matters were false, that that could be charged against the defendant; and I ask your Honor to charge that if the communication is privileged that even though the matters were false or uttered under a mistaken belief that the communication still remains privileged.

THE COURT: Yes, you may take that instruction. I think that is correct. However, I emphasized or intended to emphasize, that true or false, it must be done in good faith. Very well.

MR. SHEEHAN: And just the other, the statute says that malice cannot be inferred before or after in a privileged communication.

THE COURT: Yes.

MR. SHEEHAN: I except on the ground that the Court submits to the jury, as a matter of law, what seems to be a question of infringement. I do not think that is in this case whatsoever. The defendant has a trade-mark. As to what it believed was its rights under that trade-mark is the only thing that is pertinent.

The case was then submitted to the jury and it returned the verdict on May 9, 1935, as follows:

VERDICT OF THE JURY AND ENTRY OF JUDGMENT.

“We, the jury in the above entitled case, find in favor of the plaintiff, and assess her actual or compensatory damages in the sum of \$11,000.00; and her punitive or exemplary damages in the sum of \$9,000.00, making a total of Twenty Thousand Dollars, (\$20,000.00).”

On May 10, 1935, judgment in favor of plaintiff and against defendant in the sum of \$20,000.00 was entered in Judgment Book 7, at page 754.

MOTION FOR NEW TRIAL AND DISMISSAL.

On the 9th day of July, 1935, defendant served and filed (a) Motion to set aside verdict and for new trial and (b) Motion to Dismiss.

The Motion for new trial was based on the grounds that (1) This Court has not nor has it ever had any jurisdiction over the defendant in that (a) it was not on March 1, 1932, the date of the service of summons by serving the Secretary of State of the State of California, or at any time prior thereto, nor at the present time, a resident or citizen of the State of California, or of the Southern District of California, Central Division, (b) it was not during all or any of said times doing, conducting, transacting or carrying on any business in the State of California or in said District, (c) said Secretary of State or any deputy or assistant thereto was not authorized on its behalf to receive process, and (d) that the service of

process upon said Secretary of state did not confer jurisdiction over the defendant for the reason that Section 406a of the Civil Code of the State of California had not been fully complied with before process could be served upon defendant by serving said Secretary of State of the State of California; (2) the verdict of the jury was excessive and indicated gross error and reckless disregard of the evidence and indicated the jury was actuated by improper motive, passion and prejudice; (3) the evidence was insufficient to justify the verdict; (4) the Court erred to the prejudice of defendant in (a) refusing to entertain defendant's Motion to Dismiss, on the ground that the complaint failed to state facts sufficient to constitute a cause of action, (b) overruling objections of defendant to an introduction into evidence of plaintiff's Exhibits, (c) permitting plaintiff to amend as to jurisdictional matter during trial and as to the identity of the person of whom the letter was written at the close of trial and after motion for non-suit was made, and (d) erroneously instructing the jury, and; (5) the complaint still failed to state a cause of action.

The Motion to Dismiss was made on the same grounds of lack of jurisdiction over the defendant as set forth in the motion to set aside verdict and for new trial.

Said Motions were further based upon the records, files, affidavits and evidence in this proceeding and the affidavit of Robert V. Jordan, reading as follows, to-wit:

to the service of process or of any document or paper of any kind or character for or on behalf of said Liquid Veneer Corporation, and that said corporation is not now and never has at any time been qualified to do business in the State of California; that the only information in the office of the Secretary of State of California showing or purporting to show the name and address of the Pacific Coast representative of said corporation, if there be such, and the principal place of business of said corporation, is that contained in said letter dated January 30, 1932, from Elijah M. Smuckler, of which the attached hereto Exhibit "A" is a photostatic copy.

ROBERT V. JORDAN

Subscribed and sworn to before me this 17th day of June, 1935.

F. G. GRIEBNOW, JR.,

Notary Public in and for the above County and State."

The photostatic copy of letter referred to as Exhibit "A" in said affidavit reads as follows:

"LAW OFFICE
ELIJAH M. SMUCKLER
SUITE 923 ROWAN BUILDING,
LOS ANGELES
TRinity 0311

January 30th, 1932.

Secretary of State,
Sacramento, California.

Dear Sir:—

Enclosed herewith are duplicate copies of complaint and summons in the case of Lena G. Smuckler, doing business as French Veneer Manufacturing Company, plaintiff vs. Liquid Veneer Corporation, a corporation, defendant, together with a fee of \$5.00.

The corporation has as its Pacific Coast representative, Mr. C. E. Mack, 1890 Grove Street, San Francisco, Californai, and the *principle* place of business of said corporation is Buffalo, New York.

Please issue your usual certificate and return to me.

Very truly yours,

ELIJAH M. SMUCKLER,"

EMS-CS

(3) Encls:

The hearings upon said motions for New Trial and for Dismissal were noticed for the 15th day of July, 1935. On said date the hearings upon said motions were continued by the Court to the 29th day of July, 1935, upon Stipulation of the parties, to give plaintiff an opportunity to reply to said motions. On the 26th day of July, 1935, plaintiff, in reply to the Brief of defendant and its Motion to Dismiss, filed a Brief and the affidavits of John Brash, Byron Jack Badham, Jr., and Isador I. Smuckler, and which affidavits are as follows, to-wit:

“AFFIDAVIT OF JOHN BRASH

COUNTY OF SAN FRANCISCO,)
) SS
 STATE OF CALIFORNIA,)

JOHN BRASH, being first duly sworn on oath deposes and says:

That he is, and for more than ten (10) years last past, has been the Superintendent of a warehouse now operated by the *Haslet* Warehouse Company, at the corner of 2nd and Brannan Streets in San Francisco, California, now known as Humboldt Warehouse of the Haslett Warehouse Company, and which, up to January 1, 1932, was known as Lawrence Warehouse #19.

That as such superintendent of such warehouse it has at all times been a part of his duties to know, and he has known of the customers or patrons of said warehouse and the manner and way in which the goods of said customers or patrons were handled and kept by said warehouses.

That the business conducted by said warehouses is a general warehouse business of storing and shipping

various articles of merchandise which may come into its possession by said customers or patrons.

That affiant knows, and at all times herein mentioned has known of business concern, Liquid Veneer Corporation of Buffalo, N. Y. and that during all of said time up to and until May 4, 1932 said Liquid Veneer Corporation has maintained an account with said warehouse companies and maintained a stock of merchandise therewith:

That on or about May 4, 1932 said account and merchandise was transferred to the G. A. Hosmer Co. in which last mentioned name account has remained, until April 18, 1935, at which time the said G. A. Hosmer Co. instructed said Haslett Warehouse Co. to ship all of its Liquid Veneer Products merchandise out of the state temporarily.

That at all times herein mentioned, said Liquid Veneer Corporation and for G. A. Hosmer Co. has maintained with said Lawrence Warehouse Co. and said Haslett Warehouse Co. as the case may be, a stock of Merchandise, which would be stored in said warehouses until,

1—Orders were received to fill any order sent in by said Liquid Veneer Corporation or said G. A. Hosmer Co.

2—Local customers, which were on the accredited list of said Liquid Veneer Corporation or G. A. Hosmer Co. would call said warehouse companies and request various amounts of such merchandise to be delivered without direct order from Liquid Veneer Corporation after which the said warehouse companies would inform the said Liquid Veneer Corporation or G. A. Hosmer Co. as the case may be of the request for and delivery of such merchandise, to said accredited customers,

That a certain amount of such merchandise was always kept on hand at said warehouses for the purpose of securing the warehouseman's lien for storage thereof and services rendered to its said customers herein above referred to and for the purpose of filling future orders.

That said Liquid Veneer Corporation or G. A. Hosmer Co. would ship to said warehouses carload quantities of its merchandise, which was stored until sold, which took from one month to two years or more to-wit:

1.—On September 8, 1931, there was on hand in said warehouse 2 cases of 12 gross each of such merchandise from a particular shipment which was disposed of by orders at various times and dates up to and until May 18, 1935.

2.—On February 3, 1930 said warehouse had on hand 23 cases and 14 dozen of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to May 1, 1932. When balance of said merchandise was ordered shipped out on order of G. A. Hosmer Co.

3.—On January 16, 1932 said warehouse had on hand 11 cases of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to March 12, 1934, at which time there was left of said lot or shipment of merchandise 7 cases there of and on January 24, 1935 said 7 cases were delivered on order of G. A. Hosmer Co. That such statements of shipments and the dates and methods of delivery of said merchandise are taken from the permanent records of said warehouses which are too numerous to set forth herein, all of which are typical of said records herein above set forth and which reflect the

method or methods of handling, delivering or storing the merchandise of said Liquid Veneer Corporation.

That on May 4, 1932, the said Haslett Warehouse Co. received a letter Dated April 30, 1932 from the Liquid Veneer Corporation instructing said warehouse Company to transfer all merchandise and records to the account of G. A. Hosmer Co. effective as of February 1, 1932 and make all future shipments and bills for the account of G. A. Hosmer Co.

That no merchandise was ever received from said Liquid Veneer Corporation or G. A. Hosmer Co. on consignment basis, but was at all times received for storage to be held until such time as future sale orders were received for same which in some instances such orders were not received for as long as 2 years thereafter.

That the foregoing is a true statement of the method or methods used by the Lawrence Warehouse Co. #19, now known as the Humboldt Warehouse of the Haslett Warehouse Co. in receiving handling, storing and shipping the merchandise of the said Liquid Veneer Corporation and G. A. Hosmer. Co.

This Affidavit is given pursuant to a subpoena and subpoena duces *taken* and issued July 13, 1935, in the above entitled matter and served upon the said Haslett Warehouse Co.

Affiant JOHN BRASH

Subscribed and sworn to before me this 18th day of July, 1935.

ANNE F. HASTY

Notary Public in and for said county and state."

"AFFIDAVIT OF BYRON JACK BADHAM JR."

"STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS

Byron Jack Badham Jr., being first duly sworn, deposes and says:

That for the past eleven (11) years, he has been connected with the Hoffman Hardware Company of Los Angeles, California, and in the past ten (10) years as purchasing agent. That in his capacity as purchasing agent, he is intimately acquainted with the merchandising methods of Hoffman Hardware Company. That Hoffman Hardware Company has for many years last past, including the past six (6) years, bought merchandise from the Liquid Veneer Corporation of Buffalo, New York. That affiant personally knows E. C. Mack who is the Pacific Coast representative of the Liquid Veneer Corporation and that he has dealt with said E. C. Mack for the past six (6) years. That during these years and with particular reference to the years 1931 and 1932 said E. C. Mack would visit the Hoffman Hardware Company regularly on the average of every two (2) or three (3) months. That during said times, said E. C. Mack on behalf of the Liquid Veneer Corporation would solicit business for the Liquid Veneer Corporation and would endeavor to sell Hoffman Hardware Company increased quantities of the various Liquid Veneer Products. That the said Hoffman Hardware Company would look to said E. C. Mack as the person with whom all matters relating to Liquid Veneer Corporation could on numerous occasions be discussed and straightened out. That generally all orders of Liquid Veneer products would be mailed directly to Lawrence Warehouse #19, in San Francisco, California, now

known as the Humbolt warehouse of the Haslett Warehouse Company, or to the said E. C. Mack, at his San Francisco, California address, and shortly thereafter, generally within three (3) or four (4) days, the said orders were filled from the Liquid Veneer Corporation's stock of merchandise left at the Lawrence Warehouse (since 1932 known as the Haslett Warehouse) in San Francisco, California. Rarely were the orders either sent directly to Buffalo New York or filled from merchandise sent from Buffalo, New York, for the express purpose of filling the orders; and never was it necessary as a matter of policy for any orders first to be approved by the home office of the said Liquid Veneer Corporation at Buffalo, New York, before the said would be filled from merchandise on hand at the Warehouse in San Francisco, California, which warehouse was always designated on the invoices of the Liquid Veneer Corporation as "Our Warehouse at San Francisco".

Affiant further *state* that the invoices attached to this affidavit are of the original records of the Hoffman Hardware Company and correctly indicate that during all of the years the Hoffman Hardware Company did business with Liquid Veneer Corporation, the orders were filled from the designated Liquid Veneer Corporation's warehouse at San Francisco, California.

BYRON JACK BADHAM JR.

Byron Jack Badham Jr.

Subscribed and sworn to before me this 25th day of July, 1935.

CLARA M. MEYER

Notary Public in and for said County and State."

(Photostats.)

375-377 ELLICOTT STREET

LIQUID VENEER CORPORATION

RECEIVED
PAY TO ORDER
SEP 5 - 1930

HOFFMAN HARDWARE CO.

DATE AUG 25 1930

SOLD TO: HOFFMAN HARDWARE CO.
229-25 30. LOS ANGELES ST.
LOS ANGELES, CALIF. *O.K.*

SHIPPED TO:

VIA: P S S CO- FRT. ALLOWED

DATE SOLD 8/12/30 ORDER ENTERED 8/18/30 CUSTOMER'S ORDER 18578

TERMS 30 DAYS NET 2% 10 DAYS

QUANTITY	DESCRIPTION	PRICE	EXTENSION	TOTAL
✓ 6	DOZEN 4 OZ. LIQUID VENEER @ PER DOZEN	2.40	✓ 14.40	✓
	LESS 20%		2.88	11.52
✓ 3	SUCCESS DEALS- NEVERLEAK GASKET SHELLAC @ PER EACH	4.86	✓ 14.58	✓
✓ 2	BIG GIANT DEALS- NEVERLEAK TIRE FLUID @ PER EACH	14.40	✓ 28.80	✓ 43.38
8	SHIPPED FROM WAREHOUSE AT SAN FRANCISCO, CALIF. AUG 20 1930			54.90

Date Recd. 8-26-30
Price P. O. K.
Ext. 14.58
Total Wt.
Frt. Rate
No. of Cases

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

INVOICE



SHIPPED LIQUID VENEER CORPORATION

3 Allicott Street

Buffalo, New York

RECEIVED

Household and Automotive Specialties

RECEIVED PAYMENT

DEC 4 1931

HOFFMAN HARDWARE

Sold to

HOFFMAN HARDWARE COMPANY,
229 SO. LOS ANGELES ST.
LOS ANGELES, CALIF.

SHIP TO

137

O. K. VIA

FRT. ALLOWED

Priced Out

B.

INVOICE DATE NOV 24 1931

TERMS—CASH, Less 2% in 10 Days—30 Days Net

ORDER REC'D	11/23/31	DATE ENTERED	11/23/31	ENTERED BY	S	SHIP FROM	W	BUYER	361	SALES-MAN	16-M	CLASS	W
Quantity		DESCRIPTION								Net Per Doz.	TOTAL		
✓	DOZ.	4 OZ. LIQUID VENEER									✓		
✓	12 DOZ.	12 OZ. LIQUID VENEER								3.84	46.08		
	DOZ.	LV MOPS	DOZ. 101	DOZ. 102									
	DOZ.	LV MOPS	DOZ. 201	DOZ. 202				DOZ. 208					
	DOZ.	LV MOPS	DOZ. 301	DOZ. 302				DOZ. 308					
	DOZ.	CHAMPION SIZE	DOZ. OIL	DOZ. DRY				DOZ. DUSTERS					
	DOZ.	2 1/2 OZ. TUBES RATNIP											
	DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID											
	DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER											
	DOZ.	9 OZ. CANS RADIATOR NEVERLEAK											
SHIPPED FROM WAREHOUSE AT SAN FRANCISCO CALIF.										NOV 27 1931			
908 LA										17			

TOTAL OF THIS INVOICE

46.08

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

510127

INVOICE

REGISTERED—INTELLECTED PATENTS 2,841,828 AND 1,720,487 OTHER PATENTS PENDING—KORLE, SULLYBROOK CO. LTD., BILLYON FALLS, N. Y.

LIQUID VENEER CORPORATION

RECEIVED 310 Kilbuck Street
Household and Automotive Specialties

Buffalo, New York

RECEIVED PAYMENT
FEB 5 1932
HOFFMAN HARDWARE CO.

Sold to HOFFMAN HARDWARE COMPANY,
229-35 30. LOS ANGELES ST.
LOS ANGELES, CALIF.

O. K.

SHIP TO
137
VIA L A S S CO FRT. ALLOWED

INVOICE DATE

JAN 26 1932

Priced Out

TERMS—CASH, Less 2% in 10 Days—30 Days Net

ORDER REC'D	1/9/32	DATE ENTERED	1/11/32	ENTERED BY	S	SHIP FROM	BUYER	1701	SALES- MAN	16- M	CLASS	W
Quantity	DESCRIPTION								Net Per Doz.	TOTAL		
✓ 12 DOZ.	4 OZ. LIQUID VENEER								1.92	23.04 ✓		
✓ 12 DOZ.	12 OZ. LIQUID VENEER								3.84 ✓	46.08 ✓		
DOZ.	LV MOPS	DOZ. 101	DOZ. 102									
DOZ.	LV MOPS	DOZ. 201	DOZ. 202		DOZ. 206							
DOZ.	LV MOPS	DOZ. 301	DOZ. 302		DOZ. 306							
DOZ.	CHAMPION SIZE	DOZ. OIL	DOZ. DRY		DOZ. DUSTERS							
DOZ.	2 1/2 OZ. TUBES RATNIP											
✓ DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID								1-23-3 ✓			
DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER								HOLD			
✓ DOZ.	9 OZ. CANS RADIATOR NEVERLEAK								466			
2 ONLY	SUCCESS DEALS- NEVERLEAK GASKET SHELLAC .80								4.86	9.72 ✓		
									3.75 ✓			
SHIPPED FROM WAREHOUSE AT SAN FRANCISCO, CALIF.										JAN 20 1932		

TOTAL OF THIS INVOICE

78.84

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

2205

INVOICE

SHIPPED LIQUID VENEER CORPORATION

RECEIVED

311 Elliott Street

Buffalo, New York

Household and Automotive Specialties

RECEIVED
PAYMENT
NOV 22 1932

HOFFMAN HARDWARE CO.

Sold to
HOFFMAN HARDWARE CO.,
299-35-8 LOS ANGELES ST.,
LOS ANGELES, CALIF

SHIP TO
13-7

VIA HASLETT WHSE- LOS ANGELES SS LINE
STORE DOOR DELV. SERVICE & CITIZENS
F O B BUFFALO TRUCK
TERMS—CASH, Less 2% in 10 Days—30 Days Net

INVOICE DATE NOV -8 1932

ORDER RECD 11-4-32 DATE ENTERED 11-4-32 ENTERED BY LL SHIP FROM W BUYER 10303 SALES MAN 10-P CLASS W

Quantity	DESCRIPTION				Net Per Doz	TOTAL
DOZ.	4 OZ. LIQUID VENEER					
DOZ.	12 OZ. LIQUID VENEER					
DOZ.	LV MOPS	DOZ. 101	DOZ. 102			
DOZ.	LV MOPS	DOZ. 201	DOZ. 202	DOZ. 206		
DOZ.	LV MOPS	DOZ. 301	DOZ. 302	DOZ. 306		
DOZ.	CHAMPION SIZE	DOZ. OIL	DOZ. DRY	DOZ. DUST		
DOZ.	2 1/2 OZ. TUBES RATNIP					
DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID					
DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER					
DOZ.	9 OZ. CANS RADIATOR NEVERLEAK					
15 ONLY	HAMMOND ELEC. ALARM CLOCK DEALS - L.V. @ PER EA.				7.68	115.20
	TO CONTAIN 2 DOZ. 4 OZ. L.V.					
	1 DOZ. 12 OZ. L.V.					
	1 HAMMOND ELEC. CLOCK					
15 ONLY	HAMMOND ELEC. ALARM CLOCKS, NO CHARGE					
	SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CALIF					

TOTAL OF THIS INVOICE

115.20

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

623701

INVOICE

REGISTERED—LITTON—PAT. 2,001,000 AND 1,700,000 OTHER PATENTS PENDING—AMER. SALES CO. LTD., BUFFALO, N. Y.

RECEIVED LOW VENEER CORPORATION

RECEIVED

SHIP TO

375 Elliott Street

Buffalo, New York

JAN 2 1933 PAID

HOFFMAN HARDWARE CO.

Sold to

HOFFMAN HARDWARE CO.,
229 30 - LOS ANGELES
LOS ANGELES, CALIF

SHIP TO

137

ALREADY SHIPPED - HASKETT WHSE
FRT ALLOWED

INVOICE DATE

JAN 10 1933

O.K. Price

CASH, -30 Days Net -2% 10 DAYS

ORDER REC'D 1-10-33 DATE ENTERED 1-10-33 ENTERED BY LL SHIP FROM W BUYER SALES MAN 10-74 CLASS

Quantity	DESCRIPTION	Net Per Doz.	TOTAL
DOZ.	4 OZ. LIQUID VENEER		
DOZ.	12 OZ. LIQUID VENEER		
DOZ.	2 1/4 OZ. TUBES RATNIP		
DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID		
DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER		
DOZ.	9 OZ. CANS RADIATOR NEVERLEAK		
2 DOZ.	QUARTS LIQUID VENEER	8.00	16.00
4 ONLY	SUCCESS DEALS-NEVERLEAK GASKET SHELLAC @ PER EA.	4.86	19.44
1 ONLY	BIG GIANT DEAL - NEVERLEAK TIRE FLUID @ PER EACH	14.40	14.40

1-10-33

LAK

104# @ .72
144# @ .53
82# @ .63

changed back
1/25/33
2.63

SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CAL

TOTAL OF THIS INVOICE

49.84

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

D 0367

INVOICE

CONT. HOUSE TRADE MARK INTERFOLIOS 1-10 AM 5-12 3000 CO. LTD. HARRIS PARK N.Y.

Buffalo, New York

Sold to

HOFFMAN HIRSHMAN
LOS ANGELES, CALIF.

SHIP TO

INVOICE DATE

JAN 30 1934

TERMS—CASH,—30 Days Net

~~2~~ 10 DAYS

QUANTITY	DESCRIPTION	NET PER DOZ.	TOTAL
✓ 6 DOZ.	4 OZ. LIQUID VENEER	1.92	✓ 11.52
✓ 4 DOZ.	12 OZ. LIQUID VENEER	3.84	✓ 15.36
DOZ.	3 1/4 OZ. TUBES RATNIP		
DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID		
DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER		
DOZ.	9 OZ. CANS RADIATOR NEVERLEAK		
✓ 2 ONLY	SUCCESS DEALS- N. L. GASKET SHELLAC @ PER EA.	4.86	✓ 9.72
✓ 1 ONLY	BIG GIANT DEAL- NEVERLEAK TIRE FLUID @ PER EA.	14.40	✓ 14.40

1-20-34 DATE ENTERED 2-30-34 ENTERED BY 11 SHIP FROM BUYER SALES- MAN 5-11 CLASS W

1.25 used
 148
 Grand total

SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CAL

SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CAL

TOTAL OF THIS INVOICE

51.00

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

D11878

INVOICE

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"AFFIDAVIT OF ISADOR I. SMUCKLER

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS

Isador I. Smuckler being first duly sworn on oath, deposes and says:

That he is one of the attorneys of record for the plaintiff in the above entitled case; that as a part of the preparation for the hearing on the motion to dismiss in this case, which is set for Monday, July 29th, 1935, before the Honorable George W. Cosgrave, affiant and Harry Graham Balter, Esquire, the other attorney of record for plaintiff, determined that the veracity of the various ex-parte affidavits which had heretofore been filed in connection with the original motion to dismiss and quash on behalf of the defendant and which were subsequently again used on behalf of the defendant at the time of the trial in this cause on May 8th, 9th and 10th, 1935, should be personally checked by interviewing those who had made the affidavits; that for this purpose, affiant made a special trip to San Francisco and on July 16th, 1935, your affiant had a conversation with one J. W. Howell, secretary of the Haslett Warehouse Company, which conversation took place in the office of the Haslett Warehouse Company in San Francisco; that the said J. W. Howell is the same J. W. Howell who signed an affidavit on the 1st day of February, 1934, for and on behalf of the defendant in this action, which affidavit is on file in the records of the above entitled action; that affiant informed said J. W. Howell that he believed the information set forth in the aforementioned affidavit of J. W. Howell and similar affidavits signed by John Brash, superintendent of said Haslett Warehouse Company, W. G. Heiss in charge

of the office and the clerical work and records of said warehouse company and George Savage, sometimes employed as a substitute for said W. G. Heiss, were not true and did not reflect the true method of handling the products of the Liquid Veneer Corporation at or about the time of the institution of the above mentioned suit or at any time previous or subsequent thereto; that during said conversation, affiant discussed with the said J. W. Howell his affidavit hereinabove mentioned as well as the affidavits of John Brash and George Savage wherein the said J. W. Howell told your affiant that said affidavits did not reflect the true situation and that some of the statements therein were false and untrue, when as a matter of fact said affidavits should have stated that the Liquid Veneer Corporation during all times herein mentioned and particularly at the time of the institution of the above entitled action, maintained a stock of merchandise with the Lawrence Warehouse Number 19, in the City of San Francisco, California, which warehouse is now known as the Humboldt Warehouse of the Haslett Warehouse Company, for the purpose of filling orders of customers on the accredited list, and that any of said accredited customers of the Liquid Veneer Corporation, doing business in California, particularly in the Southern District thereof and in and around Los Angeles, were permitted to communicate with said warehouse company and place an order for various amounts of merchandise without previous order or instructions from the Liquid Veneer Corporation at Buffalo, New York, having first been received, which was the usual practice and method of handling the merchandise for the said Liquid Veneer Corporation and after which the said Haslett Warehouse Company would inform the said Liquid Veneer Corporation of the delivery and sale of

such merchandise; that the merchandise came in carload lots and a sufficient amount of stock of the said Liquid Veneer products was always maintained on hand for the purpose of filling orders sent in by one E. C. Mack, the California representative of Liquid Veneer Corporation and for the purpose of protecting their own warehouseman lien for storing and handling such products; that at the time the aforementioned affidavits were signed by the said J. W. Howell, W. G. Heiss, George Savage and John Brash, the firm of Gibson, Dunn & Crutcher were the attorneys of record for said defendant and that the said J. W. Howell further stated to me that on June 8th, 1932, he addressed a letter to the attention of Norman S. Sterry, Esquire, of the firm of Gibson, Dunn & Crutcher, the office copy of which letter was exhibited to your affiant, setting forth in said letter that the affidavits hereinbefore mentioned did not reflect the true situation of the handling of the products of said Liquid Veneer Corporation and that most of the statements therein with reference thereto were false and untrue when as a matter of fact a stock of merchandise was always maintained on hand for the Liquid Veneer Corporation, which merchandise was used for the purpose of filling future orders and that subsequent to the receipt of said letter the said Norman S. Sterry, made a special trip to San Francisco and had a special conference with the said J. W. Howell with reference thereto and immediately after said conference the said Norman S. Sterry and the firm of Gibson, Dunn & Crutcher withdrew as attorneys for the defendant in said action; that the said J. W. Howell and affiant then went to the warehouse of said Haslett Warehouse Company at the corner of Second and Brannan, in the City of San Francisco, at which place, a conference was had be-

tween the said J. W. Howell and John Brash and your affiant, at which time all the records maintained for the account of the said Liquid Veneer Corporation were exhibited to your affiant and after discussing the same, the said J. W. Howell instructed the said John Brash to sign any affidavit that your affiant would direct without reservation provided the same now reflected the true facts of the method of handling said products at the time of the institution of this suit and the service of process upon defendant Liquid Veneer Corporation; that said records were too numerous to set forth in any affidavit but that information from several of the records thereof are more particularly set forth in the affidavit of John Brash signed on July 18th, 1935 and filed herein; that the said J. W. Howell was immediately thereafter leaving for San Diego, California and that there was not sufficient time to prepare an affidavit for him to sign which is the reason that this affiant herein is setting forth the facts above stated.

ISADORE I. SMUCKLER

Subscribed and Sworn to before me this 25th day of July, 1935

JOSEPH H. WEISMAN

Notary Public in and for said County and State."

On said 29th day of July, 1935, the hearings upon said Motions were continued to the 3rd day of September, 1935, by reason of the absence of the Trial Court, Hon. Geo. Cosgrave. On said 3rd day of September, 1935, the hearings upon said Motions were continued to the 9th day of September, 1935.

On August 14, 1935, plaintiff, in further reply to the Brief of defendant and its Motion to Dismiss, filed the affidavit of J. W. Howell, which is as follows, to-wit:

“AFFIDAVIT OF J. W. HOWELL

STATE OF CALIFORNIA)
CITY AND COUNTY OF) SS.
SAN FRANCISCO.)

J. W. HOWELL, being first duly sworn upon his oath, deposes and says:

That he is the same J. W. Howell who on the 1st day of February, 1934, filed an affidavit in this case in connection with the Motion to Quash Service of Summons made herein by the defendant Liquid Veneer Corporation; that for many years last past, affiant has been the secretary of the Haslett Warehouse Company doing business as a warehouseman in the City of San Francisco; that on the 1st day of January, 1932, the Haslett Warehouse Company took over the warehouses and business of the Lawrence Warehouse Company, that up to that time had been doing a similar warehouse business in San Francisco, taking over among other things the business and possession of a warehouse at the corner of Brannan and Second Street in said city, up to that time known as “Lawrence Warehouse 19” now known and designated as “Humboldt” warehouse of the Haslett Company.

That at the time the Haslett Company took over said warehouse John (Jack) Brash was the superintendent in charge, W. G. Heiss was in charge of the office and the clerical work and records and George Savage was employed in various capacities and as a substitute for Mr. Heiss in case of his absence from the office; that said

named persons were continued in their several capacities as employees of the Haslett Warehouse Company and all except Savage have ever since maintained their respective positions.

That the business conducted by said warehouses is a general warehouse business of storing and shipping various articles of merchandise which may come into its possession by said customers or patrons.

That affiant knows, and at all times herein mentioned has known of the business concern, Liquid Veneer Corporation of Buffalo, New York and that during all of said time up to and until May 4th, 1932 said Liquid Veneer Corporation has maintained an account with said warehouse companies and maintained a stock of merchandise therewith.

That on or about May 4th, 1932, said account and merchandise was transferred as of February 1st, 1932, to the G. A. Hosmer Co. in which last mentioned name account has remained, until April 18th, 1935, at which time said G. A. Hosmer Co. instructed said Haslett Warehouse Co. to ship all of its Liquid Veneer products merchandise out of the state.

That at all times herein mentioned, said Liquid Veneer Corporation or G. A. Hosmer Co. has maintained with said Lawrence Warehouse Company and said Haslett Warehouse Co. as the case may be, a stock of merchandise which would be stored in said warehouses until:

(1) Orders were received to fill any order sent in by said Liquid Veneer Corporation or said G. A. Hosmer Co.

(2) Local customers, which were on the accredited list of said Liquid Veneer Corporation or G. A. Hosmer

Co. would call said warehouse companies and request various amounts of such merchandise to be delivered without direct order from Liquid Veneer Corporation after which the said warehouse companies would inform the said Liquid Veneer Corporation or G. A. Hosmer Co. as the case may be of the request for and delivery of such merchandise, to said accredited customers.

That said Liquid Veneer Corporation or G. A. Hosmer Co. would ship to said warehouses carload quantities of its merchandise, part of which was stored until sold, which took from one month to two years or more, to-wit:

(1) On September 8th, 1931, there was on hand in said warehouse 2 cases of 12 gross each of such merchandise from a particular shipment which was disposed of by orders at various times and dates up to and until May 18th, 1935.

(2) On February 3rd, 1930, said warehouse had on hand 23 cases and 14 dozen of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to May 1st, 1932, when balance of said merchandise was ordered shipped out on order of G. A. Hosmer Co.

(3) On January 16th, 1932, said warehouse had on hand 11 cases of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to March 12th, 1934, at which time there was left of said lot or shipment of merchandise 7 cases thereof and on January 24th, 1935, said 7 cases were delivered on order of G. A. Hosmer Co. That such statements of shipments and the dates and methods of delivery of said merchandise are taken from the permanent records of said warehouses which are too

numerous to set forth herein, all of which are typical of said records hereinabove set forth and which reflect the method or methods of handling, delivering or storing the merchandise of said Liquid Veneer Corporation.

That on May 4th, 1932, the said Haslett Warehouse Company received a letter dated April 30th, 1932 from the Liquid Veneer Corporation instructing said warehouse Company *received a letter dated April 30th, 1932 from the Liquid Veneer Corporation instructing said warehouse company* to transfer all merchandise and records to the account of G. A. Hosmer Co. Effective as of February 1st, 1932 and make all future shipments and bills for the account of G. A. Hosmer Co.

That no merchandise was ever received from said Liquid Veneer Corporation or G. A. Hosmer Co. on consignment basis, but was at all times received for storage to be held until such time as future sale orders were received for same which in some instances such orders were not received for as long as 2 years thereafter.

That affiant personally knows and has examined all of the records of the Lawrence Warehouse Company which conducted the warehousing of the Liquid Veneer merchandise up to the time that the Haslett Warehouse Company took over the Lawrence Warehouse Number 19 and that affiant knows that these records which are too cumbersome and numerous to attach to this affidavit fully reflect the statements herein made.

That the foregoing is a true statement of the method or methods used by the Lawrence Warehouse Company Number 19, now known as the Humboldt Warehouse of the Haslett Warehouse Co. in receiving, handling, storing

and shipping the merchandise of the said Liquid Veneer Corporation and G. A. Hosmer Co.

This affidavit is given pursuant to a subpoena and subpoena duces tecum issued July 13th, 1935, in the above entitled matter and served upon the said Haslett Warehouse Co.

J. W. HOWELL

Subscribed and Sworn to before me this 9th day of July, 1935.

AMY B. TOWNSEND

Notary Public in and for said County and State."

On the 7th day of September, 1935, defendant filed its written withdrawal of its Motion to Dismiss.

On said 9th day of September, 1935, said motions were regularly called on the calendar for hearing. Defendant made oral motion for an order withdrawing the Motion to Dismiss and which motion was granted and order made. Defendant made oral motion for order striking from the files the affidavits of John Brash, Byron Jack Badham, Jr., Isador I. Smuckler and J. W. Howell, and filed by plaintiff in opposition to said Motion to Dismiss, on the ground that said affidavits were incompetent, irrelevant and immaterial and said Motion to Dismiss having been withdrawn and the Court having so ordered there was nothing before the Court at the hearing to which all or any of said affidavits could or did refer or pertain, and which Motion to Strike was denied and exception noted for defendant.

The Motion for New Trial was argued. The point was particularly urged that the Court at no time had nor has jurisdiction over defendant, a foreign corporation, by reason of the failure of the plaintiff to comply with the requirements of Section 406a of the Civil Code of the State of California; that process directed to a foreign corporation may be served on the Secretary of State when, and only when, the person designated as its agent for service of process cannot be found at the address given with due diligence, or if no such person has been designated and neither its President or other head of the corporation, a Vice-President, Secretary, Assistant-Secretary, or General Manager in the State can be found after diligent search, the records and files in this case failing to show at any time prior to the service of summons on the Secretary of State of the State of California for the defendant that no person to accept service of process had been designated or that any one of said aforementioned officers or agents of the corporation could not be found after diligent search.

After submission, the Court, on September 27, 1935, denied said Motion for New Trial without comment or opinion.

ORDERS EXTENDING TERM OF COURT

On the 14th day of August, 1935, an order was made and filed extending the term of the Court in which the judgment herein was entered to and including the 9th day of September, 1935; on the 3rd day of September, 1935, at the time of the calling upon the calendar of the hearings upon the defendant's Motion to Dismiss and Motion to Vacate and Set Aside Verdict and to Grant New Trial, an order was made in Open Court and recorded in the Minutes of the Clerk that the term of the Court in which

the Judgment herein was entered be extended to and including the 9th day of September, 1935, and to which date the hearings upon said Motions were also continued; on the 9th day of September, 1935, an order was made and filed extending the term of Court in which the Judgment herein was entered to and including the 1st day of November, 1935; on the 3rd day of October, 1935, an order was made and filed extending the term of Court in which Judgment herein was entered to and including the 15th day of January, 1936, and extending the time within which the Bill of Exceptions in this cause may be served and filed, to and including said 15th day of January, 1936.

SUBSEQUENT SUBSTITUTION OF ATTORNEYS

On the 14th day of June, 1935, BICKSLER, PARKE & CATLIN and PAUL V. SHEEHAN were substituted as attorneys for defendant in place of Paul V. Sheehan, Esq.

The foregoing Bill of Exceptions contains all the material evidence offered and received on the trial of said cause, including all rulings made during the course of the trial which were excepted to by the defendant and exceptions allowed by the Court.

BICKSLER, PARKE & CATLIN
PAUL V. SHEEHAN

BY W G Danielson
Attorneys for defendant and Appellant.

The foregoing bill of exceptions is allowed and settled this Dec. 18, 1935.

Geo. Cosgrave
Judge

ORDER SETTLING BILL OF EXCEPTIONS

It appearing to the Court that the defendant herein has filed in this Court its proposed Bill of Exceptions in this cause, together with the Admission of service of counsel for the plaintiff of a copy of said proposed Bill of Exceptions and of a copy of Notice of the filing of the same and of Notice of the date of the hearing for the settlement of the same, and

It further appearing that the plaintiff has filed her proposed amendments to said Bill of Exceptions and that it has been redrafted and now includes such of the proposed amendments as are material in this appeal and as directed by the Court, and the same being duly presented to the undersigned pursuant to Notice duly given and the same having been duly considered by the Judge of this Court who presided at the trial of this cause, and the same appearing to contain all of the material evidence, the complete charge of the Court to the jury, the exceptions taken by defendant, and to be in all respects complete and proper, and having been prepared, served, lodged with and presented to the Court during the term in which the Judgment in this cause was entered as extended by orders of the Court made during said term and while the Court had the jurisdiction to make the same, and during the term in which defendant's motion for a new trial was denied and which motion for a new trial was filed and entertained by this Court during the term in which the judgment herein was entered, and

The plaintiff having made a motion to strike the Bill of Exceptions proposed by the defendant and opposing the settlement of the same having been considered by the Court and found to be without merit,

IT IS ORDERED AND DECREED that the plaintiff's motion to strike the proposed Bill of Exceptions and her opposition to the settling of the same be and the same is hereby overruled and denied, and

IT IS ORDERED AND CERTIFIED that the above and foregoing instrument denominated Bill of Exceptions and comprised of pages 1 to 166 inclusive, be and the same is hereby approved, settled and allowed in the term of Court in which the Judgment herein was entered as duly and regularly extended and in the term of Court in which the defendant's motion for new trial was denied and which motion was filed and entertained during the term in which the judgment herein was entered, as the Bill of Exceptions in the above entitled cause.

Done at Los Angeles, California, this 19th day of December, 1935.

BY THE COURT:

Geo. Cosgrave
Judge.

[Endorsed]: Lodged Dec 2-1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk. Filed Dec 19 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

MOTION TO STRIKE PROPOSED BILL OF EX-
CEPTIONS AND OPPOSITION TO SETTling
OF SAME.

COMES NOW the plaintiff by her attorney Harry Graham Balter and moves to strike the proposed Bill of Exceptions and opposes the settling of same upon the following grounds:

I.

This Court has lost jurisdiction to settle the proposed Bill of Exceptions.

II.

The proposed Bill of Exceptions should have been settled during the term within which the judgment was rendered or within such time as is provided by the rules of the United States District Court for the Southern District of California, or within such time as the term was extended by order of Court for the specific purpose of settling the Bill of Exceptions.

DATED this 12th day of December, 1935.

Harry Graham Balter
Attorney for Plaintiff

POINTS AND AUTHORITIES

I.

The Bill of Exceptions must be settled during the term within which the judgment was rendered.

Davis vs U. S. 67 Fed. 2nd 739;

Ritter vs Gulf etc. Ry. Co. 56 Fed. 2nd 369;

Walton vs Southern Pacific Co. 53 Fed. 2nd 63 at 68.

II.

The term may be extended by order of Court if the order specifically extends the term for the purpose of settling the Bill of Exceptions.

Bertino vs Marion Steam Shovel Co. 10 Fed. Supp. 354, 355; (reasoning of court affirmed in 76 Fed. 2nd 462);

Exporters of Manufacturers Products vs Butterworth-Judson Company, 258 U. S. 365, 60 L. E. D. 663.

III.

Retention of jurisdiction by the District Court beyond the term can be for specified purposes only.

Bertino vs Marion Steam Shovel Co. 10 Fed. Supp. 354, 355; (reasoning of court affirmed in 76 Fed 2nd 462);

Exporters of Manufactuers Products vs Butterworth-Judson Company, 258 U. S. 365, 60 L. E. D. 663.

IV.

An order extending the term for the purpose of filing a motion for new trial does not extend the term for the purpose of filing and settling a Bill of Exceptions.

Bertino vs Marion Steam Shovel Co. 10 Fed. Supp. 354, 355; (reasoning of court affirmed in 76 Fed. 2nd 462);

United States District Court rules for Southern District of California rule 49.

V.

Rule XI of the Rules of the District Court for the Southern District of California, does not automatically extend the term for the purpose of filing a Bill of Exceptions for the period of three months beyond the expiration of the term, but only for a period of three months beyond the first Tuesday subsequent to the rendering of the judgment.

VI.

There are no extraordinary circumstances here which justify any *relation* of these well established rules.

RESPECTFULLY SUBMITTED:

Harry Graham Balter
ATTORNEY FOR PLAINTIFF.

[Endorsed]: Received copy of the within Motion this 12th day of Dec. 1935. Bicksler, Parke & Catlin, Attorneys for Def. Filed Dec. 12, 1935 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

POINTS AND AUTHORITIES OF DEFENDANT
IN OPPOSITION TO MOTION OF PLAINTIFF
TO STRIKE PROPOSED BILL OF EXCEP-
TIONS, AND IN SUPPORT OF ORDER SET-
TLING THE SAME.

I.

The time for settling and signing a Bill of Exceptions is extended by the filing of a motion for a new trial or by any proceeding that challenges the finality of the judgment of the trial Court. If such motion is filed during the term when judgment is entered the Bill of Exceptions may be settled during the term at which the motion is denied although that term is subsequent to the term at which the judgment was entered, and no order extending time in which to serve and file Bill of Exceptions need be made.

MISSOURI K. & T. RAILWAY CO., V. RUSSELL, 60 Fed. 501, (C. C. A. 8);

U. S. V. CARR, 61 Fed. 802, (C. C. A. 8);

WOODS V. LINDVALL, 48 Fed. 73, (C. C. A. 8);

TULLIS V. LAKE ERIE, ETC., 105 Fed. 554 (C. C. A. 7);

MAHONING VALLEY RAILWAY V. O'HARA, 196 Fed. 945 (C. C. A. 6);

"The judgment was rendered at the October 1910 term. No order settling a Bill of Exceptions or providing time therefor was made at that term; but a motion for a new trial was made, submitted and its decision continued until

the next term. At the next term, the motion for new trial was denied, and a time given to settle a Bill, within which time, as extended, the Bill was settled. It is well understood, as a primary rule, that exceptions at the trial must be reduced to form and made a part of the record during the term at which judgment is rendered (*Muller v. Ehlers*, 91 U. S. 249, 23 L. Ed. 319); but it is also settled that the judgment is not finally entered, so as to be beyond the control of the Court at a later term, until a pending motion for new trial is denied. (*Kingman v. Western Mfg. Co.*, 170 U. S. 675, 42 L. Ed. 1192, *In Re: McCall*, (C. C. A. 6) 145 F. 898). 'The considerations which lead to this latter result are applicable here. It would be a vain thing to settle a Bill of Exceptions upon a judgment still contingent; and we are clear that the Court had full power over this subject during the remainder of the term at which the motion for new trial was decided. It follows plaintiff in error is entitled to be heard upon all its assignments.'

CAMDEN IRON WORKS V. SATER, 223 Fed.
611 (C. C. A. 6);

SLIP SCARF V. FILENES SONS CO., 289
Fed. 641 (C. C. A. 1);

MOORE GROCERY CO., V. PACIFIC R. M.,
296 Fed. 828 (C. C. A. 8);

Verdict returned and judgment entered in May Term. Motion for new trial filed in same term. Overruled in October term. Bill of Exceptions approved in October Term and on the next day after overruling motion for new trial.

"It has long been the rule in this and other Circuit Courts that a Bill of Exceptions is presented in time if it is presented for allowance at the term at which the motion for a new trial is determined, although that term is subsequent to the term at which the trial was had and judgment entered, if the motion for new trial was filed at the trial term, and the hearing of it was continued by the Court to a subsequent term. (Citing 48 F. 73; 60 F. 501; 61 F. 802; 98 F. 222; 105 F. 554; 196 F. 945; 223 F. 611)."

U. S. SHIPPING BOARD V. GALVESTON
DRYDOCK, 13 Fed. (2nd) 607 (C. C. A. 5);

Judgment entered January 22, 1925. On January 26th motion for new trial filed. Overruled July 14, 1925, during next term. Bill of Exceptions signed July 17, 1925.

"There is no merits in the plaintiff's motion to strike the Bill of Exceptions which was signed during the term at which the motion for new trial was overruled. The time for signing the Bill of Exceptions and suing out a Writ of Error did not begin to run until the Court acted on the motion for a new trial. Texas Pac. Ry. Co., vs Murphy, 111 U. S. 488, 28 L. Ed. 492."

GREAT NORTHERN LIFE INS. CO., V.
DIXON, 22 Fed. (2nd) 655 (C. C. A. 9);

SHALLAS V. U. S., 37 Fed. (2nd) 693 (C. C.
A. 9);

“In his petition for rehearing, the appellant contends that a motion for a new trial was pending at the time of the final adjournment for the term, and that this motion carried the case over beyond the term for the purpose of settling a Bill of Exceptions, as well as for the purpose of disposing of the motion for a new trial. This contention is no doubt well supported by authority. 48 F. 73; 98 F. 222; 105 F. 554; 160 F. 34; 196 F. 945; 289 F. 641; 296 F. 828; 13 F. (2nd) 607.”

MARION STEAM SHOVEL CO. V. REEVES,
76 Fed. (2nd) 462 (C. C. A. 8).

II.

The Bill of Exceptions may be approved by the trial Court though not filed within the time specified by the District Court rule if jurisdiction over the case has not been lost by the trial court.

RUSSO-CHINESE BANK V. NATIONAL
BANK OF COMMERCE OF SEATTLE, 187
Fed. 80 (C. C. A. 9);

TWOHY BROS. V. KENNEDY, 295 Fed. 462,
C. C. A. 9;

SPOKANE INTERSTATE V. FIDELITY DE-
POSIT CO., 15 Fed. (2nd) 48, (C. C. A. 9);

PUGET SOUND FINANCE V. NELSON, 41
Fed. (2nd) 356, (C. C. A. 9);

“Counsel moved to strike Bill of Exceptions because not filed within time prescribed by rules of the Court below. Whether the time for filing the Bill of Exceptions was extended by the pendency of a motion for new trial, we need

not inquire, because the Bill was filed and settled during the term, and whether the local rule was followed or not is not controlling. (Citing cases.)”

HOWARD V. LOUISIANA & A. RAILWAY
CO., 49 Fed. (2nd) 571, (C. C. A. 5).

Appellant did not file Bill of Exceptions within the forty-two days allowed by order in which to prepare and settle his Bill. Appellee contends the Court had no jurisdiction to allow, approve and order Bill of Exceptions. The Court states:

“The point is without merit. That the preliminary order granting forty-two days has no effect upon the inherent power of the Court at any time during the term to allow, approve, and order filed bills of exceptions is too elementary to require citation of authorities. The motion to strike is overruled.”

In Re: MORRISSEY, 67 Fed. (2nd) 267 (C. C.
A. 9);

STANTON V. EMBRY, 93 U. S. 548; 23 L. Ed.
983;

Respectfully submitted.

BICKSLER, PARKE & CATLIN
PAUL V. SHEEHAN

BY W G Danielson

Attorneys for defendant and Appellant.

[Endorsed]: Received copy of the within Points & Authorities this 16 day of Dec. 1935 H. G. Balter, attorney for Pl. Filed Dec. 16, 1935. R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

TO THE HONORABLE GEO. COSGRAVE, JUDGE
PRESIDING AT THE TRIAL OF THE ABOVE
ENTITLED COURT:

Comes now W. G. Danielson and respectfully represents:

That he is the attorney in the office of Bicksler, Parke & Catlin, the attorneys in the City of Los Angeles representing the defendant herein, the associate counsel, Paul V. Sheehan, being an attorney of the State of New York, to whom the above entitled cause was referred for the purpose of taking all such steps as may be necessary in order to preserve all rights of the defendant for the making of a motion for a new trial in this proceeding and for preserving the record so that should said motion for new trial be denied that an appeal of this action could be taken to the Circuit Court of Appeals and which appeal would be upon all of the features of and evidence pertaining to this action; that your affiant promptly thereupon examined the rules, statutes and decisions pertaining to and affecting the making of such motion for new trial and the preserving of the record in order that an appeal may be effectively taken should said motion for new trial be denied, the time within which said motion for new trial must be filed and entertained, the time within which an appeal must be taken, the time within which Bill of Exceptions must be served, filed and settled, and the other steps that must be taken to preserve the record for the defendant.

That upon such investigation the Manual of Federal Appellate Procedure of Paul P. O'Brien was consulted

and at page 31 thereof it was ascertained that "the time for the presentation of a Bill of Exceptions runs from the determination of a motion for new trial, providing the motion was filed at the trial term and the hearing continues by the Court to the subsequent term."; the recent work (1935) by Marker on Federal Appellate Procedure was examined and it was there ascertained that "the time for settling and signing the Bill of Exceptions is extended by the filing of a motion for new trial or by any proceeding that challenges the finality of the judgment of the trial Court. If such a motion is filed during entry -- or before right to present and settle the Bill has been lost, the Bill may be settled during the term at which the motion is denied, although that term is subsequent to the term at which the judgment was entered"; Rule 49 of this Honorable Court was consulted and a decision was sought determining whether the phrase in said Rule, "after the entry of the judgment or order", referred to the entry of the judgment immediately after the verdict of the jury or the judgment as it became final after proceedings upon motion for new trial had been completed. No case of the Circuit Court of Appeals for the Ninth Circuit was found construing said Rule of Court. The case of SLIP SCARF CO., V. FILENES SONS CO., 289 Fed. 641 (C. C. A. 1) was found and in which the Rule of the District Court required Bill of Exceptions to be filed within twenty days after the verdict of the jury. In said case the Bill of Exceptions was not filed within twenty days after the verdict of the jury and in fact was not filed until the term following the term wherein judgment was rendered because of the pendency of a motion for new trial. In said case the Court stated:

“According to the letter of the rule, a bill of exceptions is to be filed within 20 days after the verdict of the jury. But where a motion for a new trial is interposed, the verdict, as well as any judgment that may have been entered thereon, becomes contingent until the motion has been passed upon and determined. Until then it cannot be known that there is any occasion for filing a bill of exceptions, and this being so, no good reason can exist for saying that the time for doing so has begun to run or is past. It has been the practice in this Circuit, as well as in other circuits, to allow bills of exceptions to be filed within 20 days from the denial of a motion for a new trial and to allow an extension of time for this purpose, if applied for within the twenty days.”;

that upwards of ten cases from various Circuit Courts were examined and all of which held that a motion for new trial filed during the term when judgment is entered extends the time for the filing and settling of a Bill of Exceptions to the term in which said motion is overruled although that term be subsequent to the term at which judgment was entered, and a list of which cases has been respectfully submitted to the Court upon the hearing for the settlement of the Bill of Exceptions; that decisions of the Supreme Court of the United States were examined as to the affect of the filing of a motion for new trial and were found to hold that the judgment or decree does not take final effect for the purposes of Writ of Error or Appeal until the motion for a new trial or petition for rehearing has been determined and until the judgment or decree

becomes final the trial Court has jurisdiction over the same; that the Circuit Court of Appeals for this circuit in the cases cited to the Court in the Memorandum filed in support of settling the Bill of Exceptions has held that so long as the Bill of Exceptions is settled in the term of Court in which the judgment was entered, or an extension thereof, the same is sufficient irrespective of whether or not the Rule of the District Court has been observed.

That your affiant deducted from the investigation of the above Rules, statutes and decisions the conclusion that the judgment referred to in Rule 49 of this Honorable Court was to be construed the final judgment and which meant after the motion for new trial had been determined; that accordingly when the defendant's motion for new trial was denied on the 27th day of September, 1935, your affiant, within the ten days specified in Rule 49, and on the 3rd day of October, 1935, obtained an order from this Court extending the time within which the Bill of Exceptions herein may be served upon plaintiff or her counsel, and filed with the Clerk of this Court to and including January 15th, 1936, and in which the term of Court in which the judgment herein was rendered and entered was extended to and including said January 15th, 1936; that your affiant has at all times endeavored to meet and comply with all of the rules, statutes and decisions relating to the steps and procedure required to be taken and followed in preserving the record of the defendant for an appeal to the Circuit Court of Appeals upon not only the matters that appear in the record proper

but upon the matters which properly appear in the Bill of Exceptions. That if there has been any technical failure to comply with the rules of this Court in the matter of the time within which Bill of Exceptions must be settled your affiant submits it is because Rule 49 of this Honorable Court permits of several constructions and your affiant construed the same in the light of the only cases and decisions he could find bearing upon this question; that your affiant in his search has not found any case wherein it was held that the filing of a motion for new trial in judgment term did not extend the time for the filing and settling of a Bill of Exceptions though the ruling on the motion was not made until the following term.

WHEREFORE your affiant prays that if there has been any technical error on the part of affiant in taking the various steps required in this case to preserve the record of the defendant so that Bill of Exceptions may be approved and allowed and the matter determined by the Circuit Court of Appeals upon the merits and that it may consider the Bill of Exceptions, that he be relieved of such technical default by virtue and by reason of the aforestated facts and that the Bill of Exceptions as proposed herein, together with such amendments as may be approved, be settled and allowed.

This prayer for relief is based upon, to some extent, the case of MARION STEAM SHOVEL CO., V. REEVES, 76 Fed. (2nd) 462 (C. C. A. 8).

W. G. Danielson

[illegible]

W. G. Danielson, being first duly sworn, deposes and says: That he is the declarant in the above declaration; that he has read the foregoing and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief and as to those matters that he believes it to be true.

W. G. Danielson

Subscribed and sworn to before me this 16th day of
December, 1935.

[Seal]

Mary Jorgensen

Notary Public in and for the above County and State.

[Endorsed]: Received copy of the within Statement
this 16 day of Dec. 1935. H. G. Balter, attorney for Pl.
Filed Dec. 16, 1935 R. S. Zimmerman Clerk By R. S.
Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL AND ORDER
ALLOWING APPEAL

TO THE HONORABLE GEO. COSGRAVE, JUDGE
OF THE DISTRICT COURT AFORESAID:

The above named defendant, feeling aggrieved by the verdict of the jury and judgment entered thereon in the above entitled action on the 10th day of May, 1935, hereby appeals from said verdict and judgment to the United States Circuit Court of Appeals for the Ninth Circuit; that the errors upon which such appeal is based are contained in the Assignment of Errors filed herewith; that petitioner prays that his appeal be allowed and that a Citation be issued in accordance with law; and that an authenticated transcript of the record, proceedings and exhibits on the trial be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California;

And your Petitioner further prays that an order be made fixing the amount of security to be given by Appellant conditioned as approved by law.

DATED: This 19th day of December, 1935.

BICKSLER, PARKE & CATLIN
PAUL V. SHEEHAN,

BY W. G. Danielson

Attorneys for Appellant.

ORDER

Appeal allowed upon Appellant furnishing Bond as required by law in the amount of \$250.00

DATED: On the 19th day of December, 1935.

BY THE COURT:

Geo. Cosgrave
Judge

[Endorsed]: Filed Dec 19 1935 R. S. Zimmerman,
Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

LENA G. SMUCKLER, doing)	(
business as FRENCH VENEER ()	
MANUFACTURING COM-)	
PANY,	(	No. 5558-C
	Plaintiff,)	
	(	ASSIGNMENT
vs	)	OF ERRORS.
	(
LIQUID VENEER CORPORA-)	
TION, a corporation,	(
	Defendant.)	

Comes now LIQUID VENEER CORPORATION, a corporation, defendant and Appellant in the above entitled cause, and in connection with and as a part of its Petition for Appeal assigns the following as errors which occurred on the trial here of and on proceedings had herein both before and after said trial, and upon which errors defendant relies to reverse the judgment entered herein as appears of record, and files the following Assignment of Errors.

1. Neither the Superior Court of the State of California, in and for the County of Los Angeles, nor the United States District Court for the Southern District of California, Central Division, nor other State or Federal Court in the State of California, has now nor has ever acquired or had jurisdiction in this action over defendant,

a foreign corporation (N. Y.), for the reason that the record shows the Summons herein was served on defendant by serving the Secretary of State of the State of California, on March 1, 1932, and the record fails to show that at or prior to said date no person had been designated as defendant's agent for service of process or authorized to receive service of process in its behalf and which showing is required by Section 406a of the Civil Code of the State of California, by the plaintiff, before process against a foreign corporation may be served upon the Secretary of said State.

2. Neither the Superior Court of the State of California, in and for the County of Los Angeles, nor the United States District Court for the Southern District of California, Central Division, nor other State or Federal Court in the State of California, has now nor never has acquired nor had jurisdiction in this action over defendant, a foreign corporation (N. Y.), for the reason that the record shows the Summons herein was served on defendant by serving the Secretary of State of the State of California, on March 1, 1932, and the record fails to show that at or prior to that date, or at any time, that the President or other head of the corporation, a Vice-President, a Secretary, an Assistant Secretary or General Manager thereof in said State could not be found in said State, after diligent search, and which showing is required by Section 406a of the Civil Code of the State of California, by the plaintiff before process against a foreign corporation may be served upon the Secretary of said State.

3. The District Court erred in denying defendant's Motion filed May 2, 1932, to vacate, set aside and quash the alleged and pretended service of summons upon de-

fendant, foreign corporation (N. Y.) by serving the Secretary of State of the State of California, made on the grounds that (a) defendant was not a citizen or resident of, nor doing business in the State of California, nor in said District, prior to or at the time of service of Summons upon it, or subsequently thereto; (b) said Secretary of State of the State of California, nor any deputy thereof, nor other person within the State of California, was authorized to represent defendant or to receive process for or on its behalf; and (c) defendant not subject to the jurisdiction of either the State or Federal Courts in California, and to which denial exception was taken and noted.

4. The District Court erred in denying defendant's renewed motion filed May 7, 1935, to vacate, set-aside and quash the alleged and pretended service of Summons upon defendant, foreign corporation (N. Y.) by serving the Secretary of State of the State of California, on the grounds that (a) defendant was not a citizen or resident of, nor doing business in the State of California, nor in said District, prior to or at the time of service of Summons upon it, or subsequently thereto; (b) said Secretary of State of California, nor any deputy thereof, nor other person within the State of California, was authorized to represent defendant or to receive process for or on its behalf; and (c) defendant not subject to the jurisdiction of either the State or Federal Courts in California, and to which denial exception was taken and noted.

5. The District Court erred in permitting the plaintiff to testify upon the re-opening of defendant's motion to quash service of Summons to a conversation she said she had over two years prior thereto with a bookkeeper at the warehouse in San Francisco in which defendant stored

some of its merchandise and to the effect that customers of defendant could come there and purchase Liquid Veneer and have it shipped to them, that she could purchase Liquid Veneer there and have it shipped to her address, that agents were there to take orders and would ship from the warehouse, and that Mr. Mack, a salesman for defendant, brought his orders there for shipment, all over the objection of defendant that said conversation was immaterial, incompetent and purely hearsay.

6. The District Court erred in reserving a ruling on and refusing to grant defendant's motion to strike out the testimony of the plaintiff upon the re-opening of defendant's motion to quash service of Summons to a conversation she said she had over two years before with a bookkeeper at the warehouse in San Francisco in which defendant stored some of its merchandise, to the effect that customers could come there, purchase Liquid Veneer and have it shipped to them, that she could purchase Liquid Veneer there and have it shipped to her address, that agents were there to take orders and would ship from the warehouse, and that Mr. Mack, a salesman for defendant, brought his orders there for shipment, on the ground that said testimony appeared to be purely and entirely hearsay and a recital of statements from one on which no foundation is laid.

7. The District Court erred in refusing to entertain or hear defendant's motion made at the time of trial out of the presence of the jury and before any evidence was presented to dismiss plaintiff's complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and which refusal to entertain or hear was on the ground that the motion was untimely made.

8. The District Court erred in denying defendant's motion made after the opening statement to the jury by plaintiff's counsel to dismiss the complaint on plaintiff's opening on the grounds that it did not allege jurisdictional facts, did not allege that the letter pleaded therein was "of and concerning the plaintiff", did not allege that the pleaded letter was an unprivileged communication, to which denial exception was duly taken and noted.

9. The District Court erred in overruling defendant's objection made when the first witness for the plaintiff was called and sworn and stated her name, but before she gave any testimony, to the introduction of any evidence by the plaintiff upon the grounds that the complaint did not constitute a cause of action; the pleaded letter is a privileged communication; there was no allegation of a publication of the alleged libel; there was no allegation the pleaded letter was "of or concerning plaintiff", her name not appearing in said letter; that no element of damages was alleged, to which order exception was duly taken and noted.

10. The District Court erred in overruling defendant's objection to the amendment suggested by the Court and proposed by the plaintiff after the first witness for the plaintiff was called, that a clause reading "and has at all times hereinafter mentioned been doing business in the State of California" be added to Paragraph II of the complaint, on the ground that said amendment created a cause of action that had not thereto existed as the complaint lacked sufficient jurisdictional allegations and the proposed amendment injected entirely new matter into it to which order exception was duly taken and noted.

11. The District Court erred in overruling defendant's objection to admission in evidence of a copy of letter dated June 2, 1931, from defendant to Young's Market (plaintiff's EX. 1) and set out in the complaint and stating in substance that defendant's inspector reports Young's Market to be selling a product called "French Veneer" and this letter is to inform it that defendant's attorney have advised that French Veneer was a violation of its trade-mark "Liquid Veneer" as well as its common law rights, that a Patent Attorney would inform Young's Market that the sale of an infringing product by a dealer is looked upon as contributory infringing and makes it equally liable with the manufacturer, that defendant has had more or less difficulty with the manufacturers of this French Veneer, has tried to purchase evidence against them but they have moved around from place to place, denying their identity and their financial condition has been found to be such as not to warrant litigation, that a manufacturer inducing a dealer to sell an infringing product sells the latter a law suit, that defendant is not in the business of suing people but must protect its property and requests the discontinuance of the sale of this infringing product, that if the manufacturer was desirous of building a business rightfully his own he could choose a name without taking part of a name belonging to defendant, who has spent a fortune in building up a business under it, that in adopting the name French Veneer the manufacturer is obviously trying to trade on the defendant's rights, and which objection was made upon the ground that it was incompetent, irrelevant and immaterial, that the original letter should be introduced and not a purported copy thereof, and to which ruling an exception was duly taken and noted.

12. The District Court erred in denying defendant's motion to strike from the evidence the letter dated June 2, 1931, addressed to Young's Market and set out in the complaint (plaintiff's EX. 1) and stating in substance that defendants, inspector reports Young's Market to be selling a product called "French Veneer" and this letter is to inform it that defendant's attorneys have advised that French Veneer was a violation of its trade-mark "Liquid Veneer" as well as its common law rights, that a Patent Attorney would inform Young's Market that the sale of an infringing product by a dealer is looked upon as contributory infringing *product by a dealer is looked upon as contributory infringing* and makes it equally liable with the manufacturer, that defendant has had more or less difficulty with the manufacturers of this French Veneer, has tried to purchase evidence against them but they have moved around from place to place, denying their identity, and their financial condition has been found to be such as not to warrant litigation, that a manufacturer inducing a dealer to sell an infringing product sells the latter a law suit, that defendant is not in the business of suing people but must protect its property and requests the discontinuance of the sale of this infringing product, that if the manufacturer was desirous of building a business rightfully his own he could choose a name without taking part of a name belonging to defendant who has spent a fortune in building up a business under it, that in adopting the name French Veneer the manufacturer is obviously trying to trade on the defendant's rights, and which motion was made on the grounds that said letter was not a libel, that it was a privileged communication, that it did not mention or refer to the plaintiff and the complaint did not allege

that the letter was of or concerning the plaintiff, and to which order exception was duly taken and noted.

13. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated March 27, 1929, from defendant to May Department Stores Co., (plaintiff's EX. 2) and stating in substance that defendant had legal evidence that said company was handling French Veneer, that its attorney advises that French Veneer is a violation of its registered trade-mark "Liquid Veneer" as well as its common law rights and in handling the article the company was liable for damages with the manufacturer thereof, that its records show it has been difficult to meet the people in charge and because the sale was very meager the matter was allowed to rest for the time being, that now that the product has been found in the store of the company defendant is obliged to request the immediate stopping of the sale as were it not to do so it would jeopardise exclusive rights to its own trade-mark "Liquid Veneer", that defendant is not seeking trouble but must insist that its trade-mark and trade rights be respected which it intends to do in as friendly and business-like way as possible, which objection was made upon the ground the letter was irrelevant, incompetent and immaterial, inadmissable under the pleadings, having no relation whatsoever to the cause of action, was not properly authenticated and was in no way relevant to the allegations of the complaint and to which ruling an exception was duly taken and noted.

14. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 2, 1929, from the May Company to defendant (plaintiff's EX. 3) stating in substance that the company had received a letter from defendant calling attention to the fact that

French Veneer was infringing on defendant's rights and the company would from that day on discontinue the sale of French Veneer, which objection was made on the grounds the letter was irrelevant, incompetent and immaterial, inadmissible under the pleadings, not binding upon the defendant, having no relation to this cause of action and that anything the writer thereof could have said therein would be hearsay, and to which ruling an exception was duly taken and noted.

15. The District Court erred in denying defendant's motion to strike from the evidence said letter dated April 2, 1929, from the May Company to defendant (plaintiff's EX. 3), stating in substance that the company had received a letter from defendant calling attention to the fact that French Veneer was infringing on defendant's rights and the company would from that day on discontinue the sale of French Veneer, which motion was made on the grounds that the letter was not the original and that it was hearsay, to which ruling exception was duly taken and noted.

16. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 18, 1929, from defendant to the May Company (plaintiff's EX. 4), and stating in substance that the letter of the May Company dated the 10th was received and that the reversal of the company of its decision to take the infringing French Veneer off sale was no doubt due to misinformation but if the defendant was not in error in this regard it would have no course but to prove its case in Court as otherwise it would jeopardise its valuable rights in its trade-mark "Liquid Veneer", that no such action heretofore has been filed against manufacturers of French

Veneer as they could not be found and had no financial responsibility, but if the May Company decides to continue to market the product it would be joined in an action with the manufacturers thereof for it is a financially responsible company and could meet damages and costs which would be awarded the defendant for one aiding or abetting the sale of an infringing product is equally liable with the manufacturer thereof, that matters of this kind become expensive and it is suggested that the May Company look into the matter a little closer, not take defendant's word for it but submit the question to a real Patent Attorney, that the May Company is a valued customer and defendant desires to give it every opportunity to know all of the facts before coming to a decision which was being awaited as defendant could not afford to stand by and see its trade-mark and trade-rights disregarded, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written three years prior to June 2, 1931, the date of the letter set forth in the complaint and the basis of this cause of action, was to a different concern from the letter set forth in the complaint and which is the basis of the cause of action, and has no bearing on any of the issues involved in this action, and to which ruling an exception was duly taken and noted.

17. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 30, 1929, from defendant to the May Company (plaintiff's EX. 5), and stating in substance that defendant had received a report from its representative that the May Company was continuing to sell French Veneer, thereby aiding and abetting an infringing manufacturer to palm off French Veneer for genuine Liquid Veneer, thereby in-

juring the defendant and being unfair to the public and requesting the withdrawal of the product from the market, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written three years prior to June 2, 1931, the date of the letter set forth in the complaint and which is the basis of this cause of action, was to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted.

18. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 13, 1931, from the defendant to the May Company (plaintiff's EX. 6) and stating in substance that the defendant wanted to know if the May Company now intended to renew its sale of French Veneer when that question had been settled about a year ago, that the sale had not been stopped through the manufacturer because he jumped from pillar to post and defendant was unable to put its finger upon him and his identity had been denied, that in view of the circumstances it was natural for it to protect its trade-mark rights by joining in an action a responsible house who sells the infringing article and since the May Company is a responsible house and sells the product the natural thing to do is to sue it, that law suits are expensive but if the May Company thinks the matter is worth its time defendant will have no alternative but to go ahead, that any suit commenced would be in the friendliest manner it could possibly have it because the May Company is considered a valued customer and friend, that the trade-mark "Liquid Veneer" is well established and has been adjudicated in the Courts and to permit French Veneer

to infringe uninterrupted would be like acquiescing to its validity and others would begin jumping in the field and the first thing that would be known there would be all kinds of Veneers on the market, that if the May Company desires to handle French Veneer because it is a good product or for any other reason it should have the manufacturer adopt another name, that there are many good names which could be used for the polish, that the use of the word "Veneer" was for the purpose of trading on defendant's good will and name and defendant is duty bound to protect it, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible, had been written prior to June 2, 1931, is to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted.

19. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 23, 1931, from defendant to the May Company (plaintiff's EX. 7), and stating in substance that defendant congratulated the May Company on its business judgment in deciding in the manner it had, that the May Company was misinformed when told that defendant's representative could lay his hands on the manufacturer of French Veneer as defendant had tried to buy evidence against the manufacturer but had failed to secure the evidence as they refused to sell their products to the defendant's representatives and denied their identity, that if the May Company cared to bother at all any further it might explain to the manufacturers of French Veneer that when defendant commences an action against them some reputable customer or distributor of their product will be joined in the suit

so that whatever the manufacturers are unable to pay due to financial circumstances their distributor will make up for it, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written prior to June 2, 1931, was to a different concern than the letter alleged in the complaint, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted.

20. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated May 1, 1931, by defendant to May Company (plaintiff's EX. 8), and stating in substance that possibly the May Company is not aware that French Veneer is still on sale in one of its departments and after the demonstration thereof had been taken off, that defendant is not desirous of injuring anyone and if the manufacturer of the product wanted to go on doing business they should adopt a trade-name of their own which would be legal and build their business on the quality of their product and on their own trade-mark or name as the defendant has done, that evidence is in hand to prove that French Veneer is confusing to the public, that defendant does not want to start litigation against the manufacturers for they are not financially responsible and defendant then would have to join a responsible concern, meaning expense and trouble for the customer, that it is for that reason the May Company would have to be joined in some such action, that a final settlement of the question would be appreciated, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written prior to June

2, 1931, was to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted.

21. The District Court erred in overruling defendant's objection to admission of evidence of Mr. Strauss, Vice-President of the May Company, that French Veneer was taken off sale by it in 1928 and kept off sale during 1929 and portion of 1930, which objection was on the ground that such acts occurred prior to the date of the letter in the complaint, dated June 2, 1931, and to which ruling an exception was duly taken and noted.

22. The District Court erred in overruling defendant's Motion to Strike the letters sent to the May Company by the defendant and admitted into evidence as plaintiff's Exhibits Nos. 2, 4, 5, 6, 7, and 8, and the evidence of Mr. Strauss, Vice-President of the May Company, that French Veneer was taken off sale by it in 1928 and kept off sale during 1929 and a portion of 1930, which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted.

23. The District Court erred in stating before the jury in colloquy with respective counsel respecting the admissibility of the letters addressed to the May Company, dated May 27, 1929, April 18, 1929, April 30, 1929, April 13, 1931, April 23, 1931 and May 1, 1931, respectively and all prior to the date of the letter alleged in the complaint, to-wit: June 2, 1931, that in the absence of a specific objection heretofore made by defendant as to what was included or for an analysis of the complaint, the

Court was compelled to say that the basis of damage may reasonably be held to include all of the previous letters, to which statement an exception was duly taken and noted.

24. The District Court erred in admitting into evidence letters from the defendant addressed to the May Company, and being plaintiff's Exhibits Nos. 2, 4, 5, 6, 7, and 8 and all being dated prior to June 2, 1931, the date of the letter alleged in the complaint, on the theory that the basis of damage could include all of said previous letters, over defendant's objection and exception that the complaint alleged damages arising from only one letter, to-wit; one dated June 2, 1931, and addressed to Young's Market Co., and that said letters to the May Company prior to said date therefore were incompetent, irrelevant, immaterial and inadmissible under the pleadings.

25. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that no complaints were made to him that the public was confused as to buying the product of defendant or the plaintiff, over the defendant's objection that the same was irrelevant, incompetent and immaterial, and to which ruling an exception was duly taken and noted.

26. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that he never had any complaints from customers or buyers or managers of departments, that there was no confusion in the minds of the public between the plaintiff's and defendant's products, over defendant's objection that said evidence was irrelevant, incompetent and immaterial, the question asked the witness was leading and called for his conclusion, that said evidence had no bearing on the libel charged in the complaint, and to which ruling an exception was duly taken and noted.

27. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that in 1930 he suggested to the plaintiff that she should change the name of her product and restore it as French Polish because the demand for her polish was great and she had a customer following, over defendant's objection that said evidence was irrelevant, incompetent, immaterial and not binding on the defendant, and to which ruling an exception was duly taken and noted.

28. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that he contemplated placing plaintiff's products in other stores of the May Company, over defendant's objection that this evidence was speculative and not binding on the defendant, was incompetent, irrelevant and immaterial, and to which ruling an exception was duly taken and noted.

29. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that plaintiff's product was not placed in other stores of the May Company because it was "not wanting to buy litigation", over defendant's objection that this evidence was irrelevant, incompetent, immaterial, called for the conclusion of the witness and was not binding upon the defendant, to which ruling an exception was duly taken and noted.

30. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that the decision of the May Company not to place French Veneer in all the other stores of the May Company had no relationship to the quality or value of that product for sales purposes, over the defendant's objection that this evidence was irrelevant, incompetent and immaterial, inadmissible under the pleadings and not binding on the

defendant, to which ruling an exception was duly taken and noted.

31. The District Court erred in permitting Mr. Strauss, Vice-President of the May Company, to answer a hypothetical question that assuming from his experience as a merchandiser for thirty years and his intimate knowledge of the plaintiff's product and its competitive quality compared with other products of the same type and his personal knowledge of the plaintiff in a business relationship from his experience with her, and assuming that there were no harassment of her conduct, no threatening letters were sent to her customers by the defendant, would he say that the plaintiff could have extended her business substantially beyond the bounds that he knew it, over the defendant's objection that it was irrelevant, incompetent, immaterial and not proper, that the witness was not properly qualified, that there was no evidence on which to base any such hypothetical question, that it called for the witness' conclusion and was speculative, and which objection was overruled and to which ruling an exception was duly taken and noted.

32. The District Court erred in overruling defendant's objection to the admission in evidence of a copy of letter dated April 10, 1929, from the May Company to defendant (plaintiff's EX. 13), stating in substance that the plaintiff and her son had called on the May Company, that it did not consider French Veneer an infringement on Liquid Veneer, that the owners of French Veneer had been in the 'phone book for a number of years and their addresses could be obtained through the May Company, that plaintiff's son was an attorney located in a building in Los Angeles, and that the May Company was going to change its mind and sell French Veneer until such

time as defendant could show that it had an order restraining the plaintiff from selling her product and which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial, hearsay, not the best evidence, and inadmissible under the pleadings, to which ruling an exception was duly taken and noted.

33. The District Court erred in admitting the evidence of Mr. Max, of the May Company, that plaintiff's product was taken off sale at the May Company upon receipt of letter from defendant, dated March 27, 1929, (plaintiff's EX. 2) and kept off until 1930, when French Polish was substituted for French Veneer, over defendant's objection that any transactions between plaintiff and the May Company were absolutely incompetent, irrelevant, immaterial because the letter forming the basis of this action is addressed to Young's Market Co., and is dated June 2, 1931, and that transactions with the May Company, or any other Company, prior to June 2, 1931, would have no bearing upon the allegations of the complaint and were therefore irrelevant, incompetent and immaterial, to which ruling an exception was duly taken and noted.

34. The District Court erred in admitting the evidence of Mr. Max, of the May Company, that he never received any complaint from anyone that there was any palming off of plaintiff's product for defendant's product, over defendant's objection that any transaction between the plaintiff and the May Company was incompetent, irrelevant and immaterial since this action was based on a letter to Young's Market Co., dated June 2, 1931, to which ruling an exception was duly taken and noted.

35. The District Court erred in stating and impartially arguing before the jury in *colloquy* with counsel for de-

fendant upon objection of said counsel to a question asked Mr. Waddington, a witness for plaintiff, on direct examination and an employee of Young's Market Co., if the original letter of plaintiff's EX. 1 was received by him, and which objection was made on the ground that the complaint did not allege that the letter was received by Young's Market Co., the Court stating, questioning and arguing that did counsel not know that the answer admitted writing the letter but denied it was written for the purpose of injuring the plaintiff; that counsel's statement, he did not believe himself in a position to deny that the letter was written was exactly what the Court wanted, that counsel's position will thenceforth be the observance of the rule prevailing in that Court and in all business or trials that when there is an open and evident fact it will not be denied, that this Court and trial from the beginning has been delayed by technical—and the Court would not otherwise describe it—questioning as to whether said letter was written, that if the letter was written *lets* have it admitted, the Court did not want to hear any more of it during the trial, that the Court certainly took the statement made the day before by counsel that he did not have a copy of the letter as a denial that the letter had been written and that counsel's whole conduct was a denial that the letter had been written, and to which statements and remarks exception was duly taken and noted.

36. The District Court erred in overruling defendant's objection to the admission of a letter in evidence from it to Young's Market Co., dated September 16, 1931, (plaintiff's EX. 14) stating in substance that defendant could no longer wait for a reply to its legal notice and friendly explanation of its position concerning the sale of the infringing product, French Veneer, that if its sale is

immediately stopped the defendant would release Young's Market Co. from all claims for past infringements and in doing this the defendant was extending a favor for litigation becomes very expensive, that silence to the offer of defendant would leave it no alternative but to place the entire matter in the hands of its attorneys, and which objection was on the ground that said letter was irrelevant, incompetent, immaterial, hearsay, not the best evidence and inadmissible under the pleadings, to which ruling an exception was duly taken and noted.

37. The District Court erred in overruling defendant's objection to the admission in evidence of a letter from defendant to Young's Market Co., dated October 1, 1931, (plaintiff's EX. 15) stating in substance that defendant would have established its rights in Court against the Smucklers had they not denied their identity, moved from place to place and made it difficult for defendant to pin them down and obtain evidence against their unlawful practice, that besides they were not financially responsible and when an action is to be started against them some reputable company selling their products and thereby aiding the infringer will be joined to pay the costs and damages, and such action will be commenced against Young's Market Co. if it insists on aiding and abetting this infringer, that defendant would spend thousands of dollars on its trade rights but not five cents in tribute, and which objection was made on the ground that said letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings, to which ruling an exception was duly taken and noted.

38. The District Court erred in overruling defendant's objection to the admission in evidence of a letter from defendant to Young's Market Co., dated October 16, 1931,

(plaintiff's EX. 16) stating in substance that in reply to the belief of the Young's Market Co., that the Smucklers were not infringers that Young's Market Co., on consulting with a reputable Patent Attorney would find that French Veneer is an infringement of the trade-mark and name "Liquid Vencer" and besides constituted unfair competition, that the Smucklers are guilty on two counts and liable for all they have sold in the past and Young's Market Co. is equally guilty with them as a distributor and if it desires to continue the sale of French Veneer it will be necessary to commence an action against it in the United States District Courts, that in the United States District Court in Cincinnati, Ohio, it was held that "20th Century Veneer Gloss" was an infringement of its name and which should be considered as a substantial precedent, that the defendant will be glad to forward to the attorney for Young's Market Co. a copy of the decree of the Court in the matter of the case of the 20th Century Veneer Gloss, that the defendant is trying to save the Young's Market Co. from difficulty or expenditures but if it must go into Court to settle the matter it is going to demand damages for every bottle sold by the company and every bottle manufactured by Smucklers, which objection was made on the ground that said letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings, to which ruling an exception was duly taken and noted.

39. The District Court erred in permitting Mr. Waddington, an employee of Young's Market Co., to answer the hypothetical question "As a merchandising man with experience of over forty years, I think you said, Mr. Waddington, and with your knowledge of this product and with your knowledge of how it sold at Young's

Market in comparison with so-called well-established products, would you say that, — — — if it were allowed to develop normally, would you say that the plaintiff's product could be expanded into a large profitable business?", over defendant's objection that it called for the conclusion of the witness, for a speculative answer, and that there was no basis for such a hypothetical question, to which ruling an exception was duly taken and noted.

40. The District Court erred in denying defendant's Motion to Strike the evidence of Mr. Waddington, employee of Young's Market Co. in answer to the hypothetical question that with his knowledge of the plaintiff's product and how it sold in comparison with so-called well-established products and assuming it were allowed to develop normally would he say that plaintiff's product could be expanded into a large profitable business and in answer to which he stated that during his experience in marketing polishes of this sort he had never at any time found anything that came onto the market as quickly as this French Veneer and that at the time the threatening letter was received French Veneer was far outselling any other polish in the house and it was just like cutting it off with a knife, that it stopped all at once as a result of said letter, and which motion to strike was made on the ground that the witness was dissertating upon the qualities of French Veneer and characterizing the effect upon his business of said letter, that said dissertation of quality was outside the issue of this law suit, to which ruling an exception was duly taken and noted.

41. The District Court erred in admitting the evidence of Winifred M. Jacobs to the effect that when she recently asked for French Veneer at the May Company she was

offered French Polish which she at first refused to buy until the plaintiff told her it was the same as French Veneer, over defendant's objection that such evidence was irrelevant, incompetent, immaterial and in no way binding upon the defendant nor within the issues of the pleadings as to what said witness could do, that it was not within the elements of a libel, was purely speculative on the part of the witness and was entirely without the issues of the case, to which ruling an exception was duly taken and noted.

42. The District Court erred in admitting the evidence of plaintiff that after the first letter to the May Company from defendant in 1929 her business fell off to almost nothing, over defendant's objection that such evidence was irrelevant, incompetent, and immaterial under the pleadings, to which ruling an exception was duly taken and noted.

43. The District Court erred in denying defendant's motion for a non-suit and for dismissal of the action after all of the evidence was in and the case closed and made upon the grounds that the plaintiff had failed to establish any cause of action against the defendant, that the complaint fails to allege a cause of action, that the letter of June 2, 1931, addressed to Young's Market Co., and the basis of the complaint, is a privileged communication from a party interested in the subject of the communication to a distributor who is likewise interested, that the plaintiff is not named in the communication, there is no allegation in the complaint which alleges that the letter was written of or concerning the plaintiff, to which ruling an exception was duly taken and noted.

44. The District Court erred in permitting the plaintiff, after the close of her case and in the midst of de-

fendant's argument on a motion for non-suit on the grounds, among others, that the complaint did not allege nor did the facts prove a cause of action, to amend her complaint to the effect that the letter alleged in Paragraph VI "was intended to refer to the plaintiff, Lena G. Smuckler", over defendant's objection to the allowance of the amendment at the stage in the case when the plaintiff's case was closed, to which ruling an exception was duly taken and noted.

45. The District Court erred and confused the jury in instructing it that "under the law an unprivileged communication as applied to this case is a communication made without malice", over defendant's objection and exception that the Court had apparently misspoken in defining a privileged communication.

46. The District Court erred in failing and refusing to correct what was apparently a misstatement when it instructed the jury that "under the law an unprivileged communication as applied to this case is a communication made without malice", over defendant's objection and exception and after the attention of the Court to the same had been called.

47. The District Court erred in instructing the jury that "if malice exists then privilege cannot be claimed. 'To a person interested therein,' that is, interested in the communication. It might reasonably be said that the Young Company or the Mav Company -- the Young Company this letter was addressed to, I believe -- was interested in the subject. 'By one who is also interested.' That would be the Liquid Veneer Corporation. 'Or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive

for the communication to be innocent or was requested by the person interested to give the information.' In other words, if this were a legitimate trade necessity, a legitimate communication from one business house to another and written in good faith and everything true in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good faith, though it be true, it is not privileged. If it is false, though it otherwise agrees with the definition of 'privilege', it is not privileged.", and to which defendant took exception on the ground that if the communication from which the Court read is privileged, then though the matters therein stated were false or uttered under a mistaken belief it still remained privileged.

48. The District Court erred in instructing the jury, after reading portions of the letter dated June 2, 1931, set forth in the complaint that, "Now, gentlemen, consider seriously whether those statements are true. You are at liberty to and should contrast that with the statement of the witnesses here that the telephone of this woman was in the telephone directory throughout the time. I think the representative of the Young store said he had never any difficulty -- in fact, both witnesses stated they had never had any difficulty in finding her. And you will thereupon conclude whether that is a true statement.", and to which defendant took exception on the grounds that if the communication is privileged, even though the matters stated were false or uttered under a mistaken belief, it still remains privileged.

49. The District Court erred in instructing the jury, after reading a portion of the letter dated June 2, 1931, and set forth in the complaint, "Speaking again of the manufacturer of French Veneer, the letter goes on to

say: 'His object for adopting the name French Veneer is obvious. He is trying to trade on our rights.' That, I think, as counsel stated, if a fact, is a criminal offense and infringement under the Federal statutes. Infringement of an interstate trade-mark may be punished criminally. Now, having all of those things in mind, you will make up your minds whether this exposes the plaintiff to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business. As a matter of fact, a substance which is of general knowledge, like wood, iron, paint, that in and of itself is not the subject of the exclusive appropriation of anybody as a trade right. You sell a certain kind of flour or a certain kind of oatmeal or what not, naturally, of course, nobody can claim an exclusive right in a generic name of a well-known material exclusively. The combination only may be appropriated. The right in a trade-mark is based upon the tendency to deceive the public; that one will sell his own goods to the public intending and under conditions where the public believe them to be the goods of someone else.", to which defendant took exception on the ground that the Court was submitting to the jury the question of infringement whereas the defendant had a trade-mark and what it believed was its rights under that trade-mark was the only thing pertinent in this action.

50. The District Court erred in refusing to instruct the jury to return a verdict in favor of the defendant as requested by it upon the close of the case, and to which refusal exception was duly taken and noted.

51. The District Court erred in refusing to instruct the jury as requested by defendant that, "as a matter of law, communications relied on by plaintiff in this action

are privileged communications and that, therefore, plaintiff cannot recover unless she proves by a preponderance of the evidence that said publication or publications, even though false, were sent out by the defendant with malicious intent. Malice is a desire and disposition to injure another founded upon spite or ill will. Therefore, if you should find that the alleged publications even though false were not founded upon enmity to the plaintiff but were made with the sole desire on defendant's part to protect its own interests, then your verdict must be for the defendant.", and to which refusal exception was duly taken and noted.

52. The District Court erred in refusing to instruct the jury as requested by defendant that, "If you find the statements in the alleged libelous publications to be true, then your verdict must be in favor of the defendant. In this connection the letters relied upon by plaintiff state that plaintiff was infringing its registered trade-mark. You are instructed that, if defendant honestly believed that plaintiff was an infringer, said statements were and are not libelous.", and to which refusal an exception was duly taken and noted.

53. The verdict of the jury awarding plaintiff \$11,-000.00 as actual or compensatory damages is not supported by any substantial evidence but is so large that it indicates gross error and disregard of the evidence and the jury was actuated by improper motive or by passion or prejudice in arriving at its verdict.

54. The verdict of the jury awarding plaintiff \$9,-000.00 as punitive or exemplary damages is wholly erroneous as the complaint contains no allegations relating to exemplary damages.

55. The verdict of the jury awarding \$9,000.00 to plaintiff as exemplary damages is not supported by any evidence but indicates gross error and disregard of the evidence by the jury and that it was actuated by improper motive or by passion or prejudice against defendant in arriving at its verdict.

56. That the evidence is insufficient to sustain the verdict of the jury and the judgment thereon.

57. The District Court erred and abused its discretion in denying defendant's motion for new trial which was made and particularly urged on the ground that the Court at no time has had jurisdiction over defendant, a foreign corporation (N. Y.) because the records in this case affirmatively show that it was served on March 1, 1932, by serving Summons and copy of complaint upon the Secretary of State of the State of California, and that said records further affirmatively show that on said date, prior thereto, at the times the motion to quash was filed and heard and at the present time there has been no compliance by the plaintiff with the requirements of Section 406a of the Civil Code of the State of California, that plaintiff could not find, after diligent search, neither the President nor other head of the corporation, a Vice-President, a Secretary, an Assistant Secretary, or General Manager, if any, in this State, before process was or could be served upon the Secretary of State of the State of California, and the records in this case further affirmatively show that on said March 1, 1932, and at the time of the filing of the Motion to Quash and its submission to the Court for decision, the plaintiff failed to comply with the requirements of Section 406a of the Civil Code of the State of California by showing that no person had

been designated as the agent for defendant for the service of process or had been authorized to receive service of process on its behalf, or if such agent had been designated he could not be found with due diligence before process was or could be served upon the Secretary of State of the State of California, and which Motion was made upon all of the files and records in this proceeding.

58. The District Court erred in denying, on September 9, 1935, after the defendant's Motion to Dismiss complaint had been withdrawn and the Court had ordered its withdrawal, defendant's Motion to Strike from the files, the affidavits filed by plaintiff in defense of defendant's Motion to Dismiss, of John Brash, Byron Jack Badham, Jr., and Isador I. Smuckler, filed on the 26th day of July, 1935, and of J. W. Howell, filed on August 14, 1935, and made on the grounds that the said affidavits were incompetent, irrelevant and immaterial and there was nothing before the Court at said hearing to which said affidavits did or could refer or pertain, and to which ruling an exception was duly taken and noted.

WHEREFORE, the Liquid Veneer Corporation, a corporation, defendant and appellant, prays that the judgment in said cause be reversed and the cause remanded with instructions to the trial Court as to the further proceedings herein, and for such other and further relief as may be just in the premises.

BICKSLER, PARKE & CATLIN
PAUL V. SHEEHAN

BY W. G. Danielson

Attorneys for Appellant.

[Endorsed]: Filed Dec 19 1935 R. S. Zimmerman,
Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

UNDERTAKING FOR COSTS ON APPEAL

WHEREAS, the Defendant in the above-entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment entered against Liquid Veneer Corporation, a corporation, Defendant in said action, in said District Court of the United States for the Southern District of California, Central Division, in favor of the Plaintiff in said action, on the 10th day of May, 1935, for Twenty Thousand (\$20,000.00) Dollars, and costs of suit.

NOW THEREFORE, in consideration of the premises, and of such appeal, the undersigned, THE AETNA CASUALTY AND SURETY COMPANY, a corporation duly organized and doing business under and by virtue of the laws of the State of Connecticut, and duly licensed for the purpose of making, guaranteeing or becoming a surety upon bonds or undertakings required or authorized by the law of the State of California, does hereby undertake and promise, on the part of the Appellant, that the said Appellant will prosecute said appeal to effect and will pay all costs which may be awarded against Liquid Veneer Corporation, a corporation, on the appeal, or on a dismissal thereof or if it fail to make good its plea, not exceeding Two Hundred Fifty (\$250.00) Dollars, to which amount it acknowledges itself justly bound.

[Seal]

THE AETNA CASUALTY AND
SURETY COMPANY

BY Joseph I. Johnson

Resident Vice President

ATTEST M A Page

Resident Assistant Secretary

DATED this 19th day of December, A. D. 1935.

STATE OF CALIFORNIA,)
 (SS.
 COUNTY OF LOS ANGELES)

On this 19th day of December, in the year nineteen hundred 35, before me, MARY E. ROGERS, a Notary Public in and for the said County of LOS ANGELES, STATE OF CALIFORNIA, residing therein, duly commissioned and sworn, personally appeared JOSEPH I. JOHNSON, known to me to be the Resident Vice-President and M. A. PAGE, known to me to be the Resident Assistant Secretary of THE AETNA CASUALTY AND SURETY COMPANY, the corporation which executed the within and annexed instrument and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

Mary E Rogers

Notary Public in and for said Los Angeles County, State
 of California

*Notary Public in and for the County of Los Angeles,
 State of California.*

My Commission Expires March 11, 1938

Examined and recommended for approval as provided
 in rule 28

W. G. Danielson of
 Bicksler Parke & Catlin &
 Paul P. Sheehan

Attorney

I hereby approve the foregoing bond.

Dated the 19th day of Dec. 1935

Geo. Cosgrave
 Judge

[Endorsed]: Filed Dec 19 1935 R. S. Zimmerman,
 Clerk By Edmund L. Smith Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION AND ORDER.

IT IS HEREBY STIPULATED by and between plaintiff and defendant, through their respective counsel, that the above entitled Court may make an order directing the Clerk of this Court to forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for use in and as a part of the record and proceedings on the appeal taken in this proceeding, and for the reason that it is not possible to accurately reproduce in the Bill of Exceptions said exhibits, the following set forth and described exhibits introduced at the trial of this action, to-wit:

Plaintiff's Exhibit 9. Bottle of Liquid Veneer polish.

Plaintiff's Exhibit 10. Carton in which Liquid Veneer polish sold.

Plaintiff's Exhibit 11. Bottle of French Veneer polish.

Plaintiff's Exhibit 12. Carton in which French Veneer polish sold.

Plaintiff's Exhibits 17, 18 and 19. Plaintiff's Certificates of Award.

Dated: December 18th, 1935.

ELIJA M. SMUCKLER and
HARRY G. BALTER

By Harry Graham Balter
Attorneys for Plaintiff.

BICKSLER, PARKE & CATLIN and
PAUL V. SHEEHAN

By W. G. Danielson
Attorneys for Defendant.

ORDER

It is so Ordered.

Dated: Dec. 19, 1935

Geo. Cosgrave

Judge of the U. S. District Court.

[Endorsed]: Filed Dec 19 1935 R. S. Zimmerman,
Clerk By Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

STIPULATION RE: OMISSION IN PRINTED
TRANSCRIPT OF CAPTIONS.

IT IS HEREBY STIPULATED, by and between counsel for the respective parties hereto that in the preparation of the printed transcript of the record on appeal in this proceeding the captions at the top of all pleadings indicating the name of the Court, name of the cause and parties and Docket Number may be omitted.

DATED: December 23, 1935.

Harry Graham Balter

Harry Graham Balter,

attorneys for plaintiff.

BICKSLER, PARKE & CATLIN

PAUL V. SHEEHAN

BY W. G. Danielson

Attorneys for defendant.

[Endorsed]: Filed Dec 27 1935 R. S. Zimmerman,
Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRAECIPE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

YOU ARE HEREBY REQUESTED to make and certify a transcript of the record in the above proceeding and cause it to be filed in the Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in said proceeding, and to include in such transcript the following:

1. Complaint No. 332470 filed in the Superior Court of the State of California, in and for the County of Los Angeles, on the 17th day of December, 1931, and entitled LENA G. SMUCKLER, doing business as FRENCH VENEER MANUFACTURING COMPANY, Plaintiff, vs LIQUID VENEER CORPORATION, a corporation, Defendant.

2. Bond on Libel filed by Plaintiff in said Superior Court action No. 332470 on the 17th day of December, 1931, in the sum of \$500.00 and executed by S. S. Wolfson and M. Lowis.

3. Summons issued by the Clerk of the Superior Court of the State of California, on the 17th day of December, 1931, in and for the County of Los Angeles, in action No. 332470 and entitled LENA G. SMUCKLER, doing business as FRENCH VENEER MANUFACTURING COMPANY, Plaintiff, vs LIQUID VENEER CORPORATION, a corporation, Defendant.

4. Petition of Liquid Veneer Corporation, a corporation, Defendant, for removal of said Superior Court action No. 332470 to the District Court of the United States, in and for the Southern District of California, Central Division, and filed in the office of the Clerk of the said Superior Court on the 30th day of March, 1932.

5. Undertaking on removal executed by Aetna Casualty & Surety Company, and filed with the Clerk of said Superior Court on the 30th day of March, 1932.

6. Minute Order of the Superior Court, in and for the County of Los Angeles, granting the Petition of the Liquid Veneer Corporation, a corporation, for the removal of said Superior Court action No. 332470 to the District Court of the United States, in and for the Southern District of California, Central Division, and made on March 30, 1932.

7. Formal order of the Superior Court of the State of California, in and for the County of Los Angeles, removing said Superior Court action No. 332470 to the District Court of the United States for the Southern District of California, Central Division, signed and filed on March 20, 1932.

8. Certificate of L. E. Lampton, Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, certifying and forwarding to the Clerk of the United States District Court, in and for the Southern District of California, Central Division, the documents in connection with the removal of said cause

of the Superior Court, No. 332470 to the latter Court and dated the 25th day of April, 1932.

9. Minute Order dated November 7, 1932, granting Motion to Quash service of summons.

10. Certificate of the Secretary of State of the State of California, dated March 2, 1932, and filed in this proceeding on the 22nd day of December, 1932.

11. Answer of Defendant, Liquid Veneer Corporation, a corporation, filed on November 8, 1933.

12. Amendment to complaint filed May 9, 1935.

13. Amendment to Answer filed May 9, 1935.

14. Verdict of the Jury.

15. Judgment entered in this cause and recorded on the 10th day of May, 1935.

16. Order of the District Court upon Defendant's Motion for New Trial.

17. Notice of filing and lodging Bill of Exceptions and hearing on settlement of same.

18. Motion of Plaintiff to strike proposed Bill of Exceptions and opposition to settling of same, and Points and Authorities.

19. Points and Authorities of Defendant in opposition to motion of Plaintiff to strike proposed Bill of Exceptions, and filed December 16, 1935.

20. Verified declaration of W. G. Danielson, filed December 16, 1935.

21. Bill of Exceptions and order of the District Court settling the same.

22. Petition for appeal and order allowing appeal.

23. Assignment of Errors.

24. Bond on appeal.

25. Citation on appeal.

26. Stipulation and order for transmission of originals of Plaintiff's Exhibits 9, 10, 11, 12, 17, 18 and 19 to the Clerk of the Circuit Court.

27. Stipulation covering omission of captions at the top of pleadings indicating name of cause and Court from printed transcript of record.

28. This Praeipce.

29. Clerk's certificate to the record.

DATED: This 23rd day of December, 1935.

BICKSLER, PARKE & CATLIN
PAUL V. SHEEHAN

BY W. G. Danielson

Attorneys for Liquid Veneer Corporation, a corporation.

[Endorsed]: Received copy of the within Praeipce this 27 day of Dec 1935 Harry Graham Balter Attorney for Pl. Filed Jan 2— 1936 R. S. Zimmerman, Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 296 pages, numbered from 1 to 296 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; bond on libel; petition for removal, undertaking on removal; minute order of March 30, 1932, granting petition for removal; order for removal; certificate of the Clerk of the Superior Court of the State of California in and for the County of Los Angeles certifying and forwarding certain documents to the Clerk of the United States District Court; order of November 7, 1932, granting motion to quash; summons; certificate of Secretary of State of the State of California filed December 22, 1932; answer; amendment to complaint; amendment to answer; verdict of the jury; judgment; order of September 27, 1935, denying defendant's motion for a new trial; notice of filing and lodging bill of exceptions; bill of exceptions; motion to strike proposed bill of exceptions and opposition of same; points and authorities of defendant in opposition to motion of plaintiff to strike proposed bill of exceptions; verified declaration of W. G. Danielson; petition for appeal and order allowing same; assignment of errors; bond on appeal; stipulation and order re transmission of original exhibits; stipulation re omission in printed transcript per captions and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of February, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,

Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By

Deputy.

In the United States
Circuit Court of Appeals

For the Ninth Circuit. ✓

Liquid Veneer Corporation, a corpora-
tion,

Appellant,

vs.

Lena G. Smuckler,

Appellee.

APPELLANT'S BRIEF.

W. G. Danielson
PAUL V. SHEEHAN,

BICKSLER, PARKE & CATLIN,

By Frank R. Catlin
Title Ins. Bldg., 433 So. Spring St., Los Angeles,

Attorneys for Appellant.

FILED

Parker, Stone & Baird Co., Law Printers, Los Angeles.

SEP 10 1936

PAUL P. O'BRIEN,

CLERK

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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Appellant,

Lena G. Smuckler.

Appellee.

APPELLANT'S BRIEF.

CONCISE ABSTRACT OF CASE.

This is an appeal from the verdict of a jury and judgment entered thereon in the sum of \$11,000.00 compensatory and \$9,000.00 punitive or exemplary damages in the United States District Court, in and for the Southern District of California, Central Division, by LIQUID VENEER CORPORATION, a corporation, defendant in lower court and hereinafter referred to as defendant, in favor of appellee, plaintiff in lower court and hereinafter referred to as plaintiff, the Honorable Judge Geo. Cosgrave presiding. [Tr. 45-46.]

Plaintiff filed complaint against defendant New York Corporation, in the Superior Court of the State of California, in and for the County of Los Angeles, to recover \$100,000.00 alleged damages by reason of an alleged libel. [Tr. 3-9.] Service upon defendant was attempted by counsel for plaintiff by mailing to the Secretary of State of the State of California duplicate copies of complaint and summons, together with fee of \$5.00. [Tr. 224.] No showing of inability to serve defendant by serving its officers or meeting prerequisites of statutes of California before serving Secretary of State, was made. [Tr. 224.] Receipt of said copies were acknowledged by Secretary of State by certificate which further stated he advised defendant corporation at the addresses furnished by plaintiff's counsel, by prepaid telegram, of the fact of the service upon him of said copies and that he deposited in the mail said copies to said addresses for defendant, and further that the records of his office did not contain the name of defendant or show the location of its offices. [Tr. 26-27.]

Defendant appeared specially before the Superior Court and moved for removal of the cause to the United States District Court upon the ground of diversity of citizenship [Tr. 12-19] and which order was granted [Tr. 20-22] and the cause transferred [Tr. 23-24].

Defendant appeared specially in the United States District Court and filed written Motion to Quash pretended service of summons on defendant by serving the Secretary of State of the State of California [Tr. 52], supported by affidavits [Tr. 54-60] on the grounds that defendant was not subject to jurisdiction of either State or said Federal

Court and was not doing business in the State of California [Tr. 52-53]. Plaintiff filed counter-affidavits [Tr. 61-62]. The Motion to Quash was granted [Tr. 66] but reopened upon motion of plaintiff [Tr. 66], evidence was introduced [Tr. 68-87]. Order was made denying the Motion to Quash on the ground "that the oral evidence taken is sufficient, being uncontradicted, to show defendant was doing business in California" but reserving right of defendant to renew same at the trial [Tr. 87].

Still appearing specially defendant filed answer [Tr. 28]. The case came on for trial [Tr. 88]. The Motion to Quash was renewed [Tr. 88], affidavits filed [Tr. 92-124] and denied [Tr. 125]. Several other motions as to sufficiency of complaint [Tr. 127], and objections to admissibility of evidence [Tr. 128-129], were made and denied after which the jury was impaneled and evidence introduced [Tr. 125].

The jury returned verdict of \$11,000.00 compensatory and \$9,000.00 punitive or exemplary damages and judgment was thereupon entered. Motion for new trial and Motion to Dismiss were filed. The former denied and the latter withdrawn [Tr. 240]. The plaintiff filed, just prior to hearing upon motions for new trial and to dismiss, further affidavits *Re*: Method of doing business by defendant, to filing of which objections were made and overruled. Orders were made extending term of Court and in the judgment term when motion for new trial was ruled upon and denied order was made further extending term of the Court and time within which to file Bill of Exceptions. Plaintiff objected to settlement of Bill of Exceptions which was denied and Bill of Exceptions settled. This appeal was then taken.

Questions Involved and the Manner in Which They Are Raised.

The following are succinctly the questions involved in this appeal and the manner in which they are raised.

1. *Did the Superior Court of the State of California, in and for the County of Los Angeles, or the U. S. District Court have jurisdiction over defendant in that,*

(a) Was there such a compliance by plaintiff with the requirements of Section 406a, Civil Code of the State of California as would constitute the service of process herein a valid substituted service on defendant foreign corporation by serving Secretary of State of the State of California?

(b) Was the defendant foreign corporation “doing business” in the State of California at the time of filing complaint and service of process upon Secretary of State of the State of California and therefore subject to substituted service of process?

These questions are raised by (a) Motion to Quash pretended service of summons, (b) Motion for Dismissal for lack of jurisdiction over defendant, (c) Objections to introduction of evidence at trial, (d) Motion for new trial on ground of no jurisdiction over defendant, (e) this appeal.

2. *Did the complaint state a cause of action?*

This question is raised by (a) Motion for Dismissal at commencement of trial, (b) Objections to introduction of evidence, (c) Motion for new trial.

3. *Is the letter set forth in the complaint a privileged communication?*

This question is raised by (a) Motion to Dismiss at commencement of trial, (b) Objections to the introduction of the letter in evidence, (c) Objections to instructions of Court to jury, (d) Exceptions taken to failure of Court to instruct jury that letter was a privileged communication.

4. *Did Court err in his rulings on (a) Motions to Dismiss, (b) Admissibility of evidence, (c) In making comments in presence of jury, (d) In giving and refusing instructions, (e) Denying various motions of defendant, including Motion for New Trial?*

These questions are raised by motions to the Court, objections to admissibility of evidence and giving and refusing instructions as set out in Bill of Exceptions.

5. *Were the damages assessed excessive in that,*

(a) Were the compensatory damages supported by substantial evidence or do they reflect passion and prejudice?

(b) Were the exemplary damages permissible under the complaint and if so are they supported by the evidence or do they reflect passion and prejudice?

These questions are raised by the complaint, defendant's Motion to Dismiss after all evidence was in and the case closed, defendant's requested instruction directing jury to return verdict in favor of defendant, a review of all of the evidence, and defendant's motion for new trial.

6. *Did Court err in permitting plaintiff to file affidavits Re: Method of doing business in California by defendant, after judgment entered in the case?*

This question is raised by motion to strike said affidavits and denial thereof.

7. *Did Court err in denying defendant's Motion for New Trial?*

This question is raised by the motion made by defendant, the grounds therein stated and the order denying of the same.

Detailed Statement of the Case.

On December 17th, 1931, plaintiff filed complaint for libel in the Superior Court of the State of California, in and for the County of Los Angeles, against defendant, generally alleging that defendant was a New York corporation, that she manufactured and sold a furniture and automobile polishing preparation under the name of "French Veneer" and had established a profitable business; that defendant manufactured and sold furniture polish under the name of "Liquid Veneer"; that for the purpose of injuring plaintiff's reputation and business defendant mailed letters to various customers of plaintiff which were written for the purpose of wilfully injuring her name and destroying her business and in furtherance of its plan published a letter addressed to Young's Market Co., of Los Angeles, California, reading as follows [Tr. 5]:

"Buffalo, N. Y.

U. S. A.

June 2, 1931.

Young's Market,
7th Street,
Los Angeles, California.

Atten: General Manager.

Gentlemen:—

Our inspector reports your selling and offering for sale a product called "French Veneer", this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark "Liquid Veneer" as well as our common law rights.

We recently found this product on sale at the May Company. We have explained our position to the May Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Court as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

We have had more or less difficulty with these people who manufacture this so-called "French Veneer" have tried to purchase evidence against them individually, but they move around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

It is a different matter, however, where we find a responsible house, like yourselves, handling an in-

fringing product, because at the end of a law suit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We therefore request that you immediately discontinue the sale of this infringing product and advise us to that effect promptly.

The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to some one else, who has spent a fortune in building up their business under that name.

His object for adopting the name "French Veneer" is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing "French Veneer" which she had been using for years. This housewife on finding that she had purchased the wrong Veneer returned it to the May Company and received the proper genuine "Liquid Veneer."

We will await your prompt reply, and remain,
meanwhile,

Yours very truly,

LIQUID VENEER CORPORATION.

MARTIN J. CABANA, Vice-President."

That said letter intended to and did convey the meaning that plaintiff had infringed upon a right of defendant of which it was exclusively possessed and that plaintiff was wrongfully selling a product to said Young's Market; that plaintiff could not be found; that she was an irresponsible person and that by reason of the said letters Young's Market and other customers refused to do business with the plaintiff; that she has always maintained a good reputation and credit; that the statements contained in the communications of defendant were false and untrue and for the purpose of destroying the good name, reputation and business of plaintiff "and that by reason of *the* said false, malicious and defamatory *publication aforesaid* plaintiff has been and is greatly injured and prejudiced and that the reputation of her business has been prejudiced and injured and she has lost and been deprived of credit, gain and profit which would otherwise have arisen and accrued to her in her business, all to her damage in the sum of one hundred thousand dollars (\$100,000.00)"; she prayed for \$100,000.00 actual damages, for such sum as the Court deemed just in the form of exemplary and/or punitive damages, for her costs, and for general relief. [Tr. 3-8.]

The necessary undertaking on libel was filed [Tr. 10 and 11] and summons was issued [Tr. 25 and 26]. On January 30, 1932, plaintiff's counsel prepared a letter to the Secretary of State of the State of California, reading as follows [Tr. 224]:

“Law Office

Elijah M. Smuckler

Suite 923 Rowan Building

Los Angeles

Trinity 0311

January 30th, 1932.

Secretary of State,
Sacramento, California.

Dear Sir:

Enclosed herewith are duplicate copies of complaint and summons in the case of Lena G. Smuckler, doing business as French Veneer Manufacturing Company, plaintiff vs. Liquid Veneer Corporation, a corporation, defendant, together with a fee of \$5.00.

The corporation has as its Pacific Coast representative, Mr. C. E. Mack, 1890 Grove Street, San Francisco, California, and the principal place of business of said corporation is Buffalo, New York.

Please issue your usual certificate and return to me.

Very truly yours,

Elijah M. Smuckler.”

This letter was received by the said Secretary of State on the 1st of March, 1932, who issued to plaintiff's attorney his certificate acknowledging receipt of said duplicate copies of complaint and summons and \$5.00 fee and advising he informed the defendant, by prepaid telegram, at addresses furnished by plaintiff's counsel of service upon him of duplicate copies of said complaint and summons and stating he mailed to defendant at said addresses said copies of summons and complaint, and further certifying

that the records of his office did not contain the name of the defendant corporation or show the location of its offices [Tr. 26 and 27]. This certificate was not filed until December 22, 1932 [Tr. 27].

Defendant appeared specially in the Superior Court by Petition for removal of case to the U. S. District Court upon the ground of diversity of citizenship. In petitioning for removal defendant reserved to itself the right after removal of specially appearing in the District Court and moving it to quash, vacate and set aside the alleged and pretended service of summons and complaint upon said defendant [Tr. 12-15]. Proper undertaking on removal was filed [Tr. 17-18]. Upon due notice Minute Order and formal Order of Removal of cause to the U. S. District Court were made by the Superior Court [Tr. 20-21] and on April 25, 1932, the Clerk of the Superior Court certified to the U. S. District Court copies of complaint, bond on libel, notice of filing petition for removal, petition for removal, bond on removal, minute and formal order of removal [Tr. 23], these being copies of all the original documents on file in his office and proceedings of record in the action at the time order for removal was filed.

Upon May 2, 1932, defendant appeared specially and without submitting itself to the jurisdiction of the Court and filed with the District Court its "Motion to Quash" pretended service of summons on the defendant upon the grounds that (a) defendant was not a citizen or resident of nor doing business in the State of California, nor within said District prior to or at the time of service of summons upon the Secretary of State or subsequently thereto, (b) said Secretary of State of the State of Cali-

fornia, no deputy thereof, nor other person within the State of California was authorized to represent defendant or receive process for or on its behalf, (c) that defendant was not subject to the jurisdiction of either the State or Federal Courts in California [Tr. 52-53]. The affidavits of Robert V. Jordan, Martin J. Cabana and Fred D. Morgan were filed in support of said motion [Tr. 54-60]. The affidavit of Robert V. Jordan stated he was Assistant Secretary of State of the State of California on March 1, 1932, which office received on that date copies of summons and complaint in this action, that there was not then nor had there ever been on file in the office of said Secretary of State any copies of the Articles of Incorporation of defendant or any statement of any kind or character of it, or any designation of any person as agent to accept service of process for it, and that defendant was not a California corporation, was not on said date nor had been at any time prior thereto qualified to do business in the State of California [Tr. 54]. The affidavit of Martin J. Cabana stated he was executive vice president of defendant which was a New York corporation, that its office and principal place of business was in the City of Buffalo, New York, that its business was the manufacturing and sale of household and automotive specialties and that, excepting such business as is transacted in the State of New York and in small part abroad, its business is wholly in interstate commerce. That defendant was not then nor had it ever been doing business in California, nor had it maintained an office or place of business there, nor had it now or ever had any offices or agents in the State, nor had it at any time designated any attorney, firm or corporation to accept service upon it in California, that it had no property either real or per-

sonal within said State excepting goods "in transit," that it never filed its Articles of Incorporation with the Secretary of said State nor had made any effort to qualify itself to do business in the State of California and had never designated the Secretary of State or any other person to receive or accept services on summons or other process on its behalf, that E. C. Mack was a traveling salesman soliciting orders for defendant on a commission basis in the States of California, Washington and Oregon, that defendant shipped its products direct from Buffalo, New York, on orders received and its shipments were interstate, that some of its shipments, while in transit, were at times redistributed by public warehouse forwarders to other points of ultimate destination but previously bulked for freight economy; that orders are sent to defendant at Buffalo, entered in its books there, are made up and shipped from Buffalo and that invoices for its goods are sent out from Buffalo and shipments are F. O. B. Buffalo, New York. That defendant has never transacted any business in the State of California other than the shipment in interstate commerce of its products into said State and the necessary details in connection therewith [Tr. 55-57].

The affidavit of Fred D. Morgan states he is Secretary and General Manager of defendant and generally reiterates the facts set out in the affidavit of Martin J. Cabana and further stating "that for purposes of economy at times some goods are bulked in transcontinental shipments to one point in said State (California) and thereafter are redistributed by public warehouse forwarders to points of their ultimate destination" [Tr. 58-60].

Plaintiff and her attorney filed counter affidavits [Tr. 61-62], the plaintiff stating that defendant maintained a stock of merchandise at a warehouse company in San Francisco, that she had seen orders in possession of said warehouse company executed by the defendant ordering the warehouse company to ship merchandise out of stock on hand to various points and concerns in California, that E. C. Mack had called on her as agent for defendant and endeavored to adjust differences that had arisen between the parties hereto, that orders for merchandise of defendant were made by concerns in Los Angeles and which were ordered by the defendant to be filled from the stock in the warehouse company at San Francisco [Tr. 61].

The affidavit of plaintiff's attorney stated he had investigated the fact as to whether or not defendant was doing business in California and maintained a stock of merchandise, that his investigation showed defendant kept merchandise stored in a public warehouse in San Francisco and which was held subject to the order of defendant, that merchandise was shipped out on orders received by defendant subsequent to the time when said merchandise was placed in the warehouse.

Defendant filed in reply, affidavits of E. C. Mack and Fred D. Morgan [Tr. 63-66]. The affidavit of E. C. Mack stated that he was a traveling salesman on the Pacific Coast for defendant and his duties were confined entirely to soliciting in that area orders for goods of defendant, said orders being forwarded to home office at Buffalo, New York, for acceptance by defendant, that no sales were made by him of defendant's merchandise within the State of California, he merely soliciting orders for defendant's products which were transmitted to Buffalo

for acceptance, that his compensation was entirely upon commission, that he has never been authorized to represent the corporation in any other manner than to solicit orders and that he never called upon the plaintiff for the purpose of selling her any of defendant's merchandise and never had any conversation with her in any representative capacity [Tr. 63-64].

The affidavit of Fred D. Morgan states that E. C. Mack had no authority to call on plaintiff at any time for the purpose of adjusting any differences between her and defendant, if, in fact, said E. C. Mack did so call upon her; that said E. C. Mack was employed by defendant as a traveling salesman upon commission basis in the territory of the States of Washington, Oregon, Nevada, Montana, Idaho and Northern California, that all his orders are forwarded to Buffalo, New York, for acceptance at the home office of defendant, that he had no authority to represent defendant in any manner or transact business for it or do anything in connection with defendant's business other than to solicit orders for the manufactured products of defendant within his territory and to forward the same to Buffalo, New York, for acceptance, that upon acceptance the same were filled at Buffalo, and shipped either directly to the person giving the order or in c/o a warehouse to be delivered to the person placing the order upon payments of the invoice of the goods, freight and warehouse charges [Tr. 64-66].

The Motion with the supporting and counter affidavits was taken under submission on July 11, 1932. On November 7, 1932, Judge Cosgrave granted defendant's Motion to Quash. This order was set aside on December 12, 1932, leave being granted to plaintiff to file a Brief in

opposition to the Motion. While the Motion was under such submission plaintiff moved to reopen the hearing on the Motion and to permit plaintiff to present testimony of certain witnesses and which Motion was granted. On May 13, 1933, oral testimony was taken, the defendant still appearing specially under the reservation of special appearance made at the time of making the original motion.

Witnesses from the May Company and Young's Market, both of Los Angeles, identified and there was then introduced into evidence invoices of defendant representing sales of its products to said companies. These showed the office of defendant to be in Buffalo, New York, and bore the notations:

“Balance of order shipped from warehouse,”

Plaintiff's Exhibit 1, to May Company, dated July 7, 1932 [Tr. 69],

Plaintiff's Exhibit 4, to May Company, dated April 13, 1932 [Tr. 70],

“Ship from warehouse at San Francisco, Calif.”

Plaintiff's Exhibit 2, to May Company, dated July 18, 1932 [Tr. 70],

Plaintiff's Exhibit 7, to May Company, dated Feb. 13, 1933,

Plaintiff's Exhibit 5, to May Company, dated April 16, 1932,

Plaintiff's Exhibit 9, to Young's Market, dated April 30, 1930,

Plaintiff's Exhibit 10, to Young's Market, dated March 20, 1931.

The above also show the shipments were “*Via. Wab. c/o S. Fe.—prepaid.*”, “*Pac. S. S. Co.,—Frt allowed,*” “*Haslett Whse—Pacific SS Co., frt prepaid,*” “*P s s Co.,—prepaid.*”

Certain other bills to the May Company (Plaintiff's Exs. 3 and 6) and to Young's Market Co., (Plaintiff's Exs. 11 and 12) [Tr. 70] and each bearing the notation under name of shipper of “*Lawrence Whse Co., a/c Liquid Veneer Co.,*”.

The saleslady and demonstrator for defendant testified that she demonstrated defendant's merchandise at the May Company together and along with merchandise of the May Company and received her compensation from the defendant. She is there to help customers and to show them and to demonstrate to them merchandise. There are about twenty of such demonstrators showing different lines. She also sells other merchandise of the May Company. When the products of the defendant are low she goes to the buyer, gives him an order and the goods are received [Tr. 74-75].

The plaintiff testified that she went to the warehouse in San Francisco in the early part of 1932 and saw merchandise marked “*Liquid Veneer.*” Over objection she testified to a conversation she had with a “*bookkeeper*” at the warehouse, she asking if customers could come there and purchase Liquid Veneer and have it shipped to them and he answering that they could. Upon examination by the Court she testified that perhaps she was in the warehouse an hour and she then described a large room which was filled with boxes and paper cartons marked Liquid Veneer, as well as the position of the furniture. She did not see any purchases of defendant's product made

while she was there [Tr. 78-80]. On cross examination she testified she did not learn the name of the 'book-keeper' although she was gathering information at the time as to whether or not defendant was doing business in California. She said this occurred in 1930 or 1931 and the action was brought in March 1932. She could furnish no description of the bookkeeper [Tr. 80-81].

Defendant filed two affidavits by the Vice President and other officer of defendant [Tr. 82-87] reciting each to be familiar with the method by which defendant did business and that in shipping merchandise from Buffalo, New York, to the West Coast of the United States it was at times necessary and advisable for purposes of economy to ship merchandise in carload lots, have it deposited in a central point such as in a warehouse in San Francisco and to have the shipments broken up and reshipped and redistributed to various customers at various points on the West Coast, that when a customer's order is reshipped and redistributed from a public warehouse to him it is ordinarily freight billed from the warehouse, that no person without authority from the shipper would have access to inspect shipper's merchandise in any public warehouse and that defendant never carried a permanent warehouse stock, never employed any person in the warehouse to be in charge of its merchandise, never had any employee at the warehouse authorized to receive or accept orders and that May Company and Young's Market, in Los Angeles, had been customers with an established line of credit, their merchandise would either be shipped direct from Buffalo or a part of the order might be filled by routing the merchandise from the public warehouse in order to economize on freight charges from New York.

On October 7, 1933, the Court denied the Motion to Quash upon the ground that the oral evidence being sufficient, "being uncontradicted," to show defendant was doing business in California, but reserved the right to defendant to renew the motion at the time of trial [Tr. 87].

Answer of defendant was filed November 8, 1933, wherein it appeared specially reserving and insisting upon its objection to the jurisdiction of the Court challenging and denying the jurisdiction of the Court over defendant, generally denying the allegations of the complaint, and setting up affirmatively the defenses that defendant was possessed of trade-mark and trade name of "Liquid Veneer" and that the use of plaintiff of a trade-mark and trade name of "French Veneer" was infringing upon the trade-mark of said defendant, and that the statements set forth in the letter alleged in the complaint were true [Tr. 28-37].

On May 7, 1935, the date of trial and before any evidence was presented to the jury, defendant renewed its Motion to Quash service of summons upon the defendant, filing a renewed written motion and affidavits. The motion was made upon the grounds that service of process upon the Secretary of State was ineffective for any purpose, that he nor any other person in the State of California was or had been authorized to accept process for the defendant, that defendant was not doing business in the State of California or in the District of the U. S. District Court, that neither the State nor Federal Court had jurisdiction over defendant [Tr. 88-89]. The Motion was based on the affidavits theretofore filed, by affidavits of John Brash, George Savage, J. W. Howell, W. G.

Hiese and Edison Lloyd, employees of the warehouse company in San Francisco, and of Martin J. Cabana, Vice-President of defendant [Tr. 90-91]. The employees of the warehouse company referred to were respectively Superintendent, Assistant Office Manager, Secretary, Office Manager and former General Superintendent. These affidavits generally state that the warehouse in which defendant's merchandise was kept was located at 285 Brannan Street, San Francisco, and was subsequent to January 1, 1932, Humbolt Warehouse of the Haslett Warehouse Company and which prior to said January 1, 1932, was known as "Lawrence Warehouse 19," that a change of ownership of warehouse was the cause for change of name, that its business was that of a general storage business including the receipt of goods in bulk shipments of carload lots or lots by water routes from various parts of the United States and beyond the boundaries of California and the taking of said goods into the warehouse for the purpose of breaking up such bulk shipments and distributing them to the customers of the shippers according to directions furnished by the shippers, that defendant was a patron of said warehouse and had shipped its products to the warehouse in carload or other bulk shipments to be broken up and reshipped from the warehouse to customers of defendant in California and neighboring States as it should be directed by the defendant, that at various times and intervals a carload or carloads of defendant's product would be sent to said warehouse which would be notified of such consignment, that upon receipt of the merchandise it would be unloaded, segregated from other goods until reshipped, that defendant would mail from Buffalo, New York, instructions to break up such shipment and reship certain ar-

ticles and quantities as itemized in its instructions to its various customers in California and adjoining States, that if actual orders for reshipment were not sufficient to exhaust the bulk shipments in each event, additional shipping instructions would follow, that upon receipt of the goods and instructions to reship the warehouse force would unload the goods and would segregate them from the mass of such goods filling the shipping directions. If any goods were left over they would be held until receipt of other directions from defendant, that in disposing of these shipments neither the warehouse or its employees had anything to do with the sale of the same or the invoicing of them to the parties to whom they were shipped or knew anything about the sale, the price, the terms of sale or value of the goods, that the employees simply broke the bulk shipment and reshipped it to designated parties in designated amounts and made out no papers except the ordinary shipping bill of lading, that none of said employees ever had received instructions or permission to sell any of the goods nor were they given the sales price of the goods nor were the goods ever billed or invoices sent or made out by the warehouse company or its employees, that said employees never did nor could quote prices and never sought to do or did sell or assume to sell any such goods and were in no way authorized to represent or act for the defendant except in making the shipments as aforesaid, and were never given authority to make any representations or statements of any kind concerning the sale of the goods of defendant and if any employee represented goods of defendant could be purchased at the warehouse he was without authority to do so and was in error for the warehouse never sold nor had authority to sell any of such goods or had information

as to the prices at which they were sold or were to be sold, that a transcript of the testimony of the plaintiff in this action has been read and in reply thereto it is stated there was no room on the first floor of the warehouse adjacent to the office into which a door opened from the part of the building occupied as an office and entrance to the building as the back part of the building was partitioned off with no entrance thereto from that part of the building and no goods of the defendant had ever been kept or placed in said room, that for more than five years goods of defendant when received at the warehouse were immediately put into the basement where they were broken up for reshipment and to go to the part of the basement in which these goods had been put and kept it was necessary to go the width of the building on Brannan Street, around the end of the railroad track extending into the building, then back the length of the building to some stairs and thence down the stairs to the basement floor, that none of said employees had any experience with a woman appearing seeking information with regard to defendant's products, that the warehouse business as conducted by the warehouse in question and as generally conducted in the city of San Francisco is a confidential business in which it is neither ethical or proper to disclose the business of the patrons, that it would be contrary to the rules and practice of the warehouse company for an employee to disclose the relations between it and a patron or the fact or extent of the storage of goods of any patron and no employee was ever authorized or permitted to make any statement or admission on behalf of the defendant, that the largest amount of goods of defendant in the warehouse would not fill the half of any court room these employees had

ever seen and that it would only be upon unloading one of the largest shipments and before distribution thereof to customers that goods could be present in quantities large enough to permit extravagant statements that merchandise sufficient to fill a court room was on hand [Tr. 92-117].

The affidavit of the Vice President of defendant stated that since about 1910 defendant's products had been supplied to persons in the State of California by one of three methods: (1) By filling orders received by mail or telegraph at Buffalo, New York, direct from the purchasers and shipping the orders by mail or common carrier direct to the ordering party from Buffalo and billing therefor and receiving remittance of the purchase price thereof at Buffalo, New York, (2) By filling orders received at Buffalo, New York, by mail or telegraph from traveling salesmen on commission basis only and shipping direct, by mail or common carrier from Buffalo, New York, to the ordering party in California, and receiving remittance of the purchase price at Buffalo, New York, (3) By receiving and approving orders at Buffalo, New York, by mail or telegraph either direct from ordering parties or from commission salesmen and shipping the aggregate of a large number of such orders to the public warehouse in San Francisco in bulk by carload or other shipment to be by said warehouse company re-shipped in smaller lots to the various persons whose orders were to be filled, all orders for goods were first to be approved by the proper officers of defendant at Buffalo, and no one outside of the office of the Company at Buffalo was authorized or permitted to approve any order or authorize any shipment of goods or extend any credits,

that all business of defendant except for solicitation of orders subject to approval at home office was conducted at Buffalo, New York, and in so organizing and conducting its business the deliberate policy and purpose of defendant was to engage in interstate business only and not to in any way conduct any intrastate business, that since 1910 no shipments were made to any warehousemen in California except to the Lawrence Warehouse Company prior to January 1, 1932, and subsequent thereto to the Haslett Warehouse Company in San Francisco, that these shipments were not solely for reshipment or distribution to persons in California but also to customers in Washington, Oregon and other adjacent States as the case might be to make a carload lot for economy of distribution, that when it appeared in Buffalo that the orders coming from California and surrounding States warranted a bulk shipment the goods called for by the orders were not shipped direct to the parties but the orders were permitted to accumulate until, taking into account the time required for a carload or other bulk shipment to reach San Francisco, it was estimated the orders accumulated by the time of the arrival would equal the contents of bulk shipment and thereupon the shipment would be made to the warehouse company, that upon making such shipment or shortly thereafter the office at Buffalo would forward to the warehouse at San Francisco directions for the reshipment to the ordering parties of certain specified quantities of merchandise, these instructions forwarded so as to reach San Francisco on or about the time estimated for arrival of the freight shipment, that it was the purpose of defendant not to accumulate any surplus of goods in California and if it appeared that the goods shipped exceeded the orders additional shipping

directions would be forwarded, that on some occasions orders were cancelled or approval revoked after bulk shipment had been made with the result that a small surplus of goods may at times have accumulated at the warehouse for a short period of time, in which event additional shipping instructions were given to fill additional orders, but that except immediately upon receipt of a bulk shipment and before the reshipping process was completed there was never any large amount of defendant's goods in the warehouse in California. That neither the warehouse nor any of its employees were directly or indirectly authorized to do any of the things stated by the plaintiff in her affidavit, no bills or invoices were ever in the authorized possession of anyone in California except the purchaser of the goods to whom the invoices were sent direct from Buffalo, neither the warehouse nor its employees was ever furnished with prices of defendant's products and would not and did not know the prices at which the goods were or could be sold and that if any person pretended to act on behalf of the defendant and had conversation with the plaintiff as stated in her affidavit or exhibited to her any bills or invoices for goods such person was an impostor and the bills and invoices were spurious because no bills or invoices ever were in the hands of any warehouse or its employees who had nothing to do with the billing or invoicing of the shipments of goods of the defendant but which in all cases was done from the office in Buffalo, New York [Tr. 118-124].

The plaintiff filed no counter-affidavits, and presented no further evidence upon the motion. The Court again denied the Motion to Quash [Tr. 125] and ordered the trial to proceed.

Out of the presence of the jury counsel for defendant moved to dismiss the complaint on the ground it did not state facts sufficient to constitute a cause of action, which the Court refused to entertain because of "its being entirely untimely" [Tr. 127]. After opening statement of counsel for plaintiff, defendant's counsel moved to dismiss the complaint on the opening statement on the grounds that the complaint did not allege any jurisdictional facts, nor that the letter set forth was of and concerning plaintiff, nor that there was a publication of what was claimed to be a libel nor any facts of damage, nor that it was an unprivileged communication. Upon denial of the motion, the first witness was sworn and after stating her name and employment, counsel for defendant objected to the introduction of any evidence on the grounds that the complaint did not state facts sufficient to constitute a cause of action, that the letter set forth in the complaint was a privileged communication, that there was no alleged publication of the letter, that the letter did not show it was in any way of or concerning plaintiff, and no proper allegation of damages was made. On suggestion of the Court and over objection of counsel for defendant plaintiff amended Paragraph II of her complaint adding thereto "and doing business within the State of California." Thereupon the objection to the introduction of evidence was overruled and evidence was introduced [Tr. 129-30].

The original of the letter set forth in plaintiff's complaint [Tr. 5] addressed to Young's Market Co., in Los Angeles, could not be found and over defendant's objection and exception what purported to be a copy of the original letter was introduced as Plaintiff's Exhibit 1

[Tr. 131-33]. Because of objections of counsel for defendant to the admission of the purported copy of the letter, he was directed by the Court to take the witness stand. He testified that he did not know of his own knowledge that defendant did not have a carbon copy or any copy of the letter but that it told him it did not have it when he requested the same [Tr. 134]. The letter was then read to the jury [Tr. 135-37]. Motion of defendant to strike out the letter on the grounds that it was not a libel and was a privileged communication and that there was no mention of the plaintiff in the letter was denied. Witnesses of the May Company, in Los Angeles, identified correspondence between it and the defendant dated from March 27, 1929, to May 1, 1931, being six letters from defendant to the May Company and one letter from the May Company to defendant, and over the repeated objection of counsel for defendant to the introduction of any of these letters because of the remoteness in period of time of some of them to the time set forth in the complaint and because the complaint was predicated upon the one letter to the Young's Market Co., and upon the ground that the same were incompetent, irrelevant and immaterial, the same were introduced as plaintiff's Exhibits 2 to 9 inclusive [Ex. 2, Tr. 139; Ex. 3, Tr. 141; Ex. 4, Tr. 143; Ex. 5, Tr. 146; Ex. 6, Tr. 148; Ex. 7, Tr. 151; Ex. 8, Tr. 153]. Exceptions were duly taken. The tenor of these letters was that Mr. and Mrs. Smuckler, residing in Los Angeles, were selling a preparation called French Veneer and which defendant considered to be an infringement upon its exclusive rights and its trademark of "Liquid Veneer," that the May Company, it was understood, was handling this product and unless the sale of the product was discontinued by the May Com-

pany an action would be brought to restrain the continuance of the infringement and the May Company would be joined as a party defendant in the action in order that the damages sustained by the defendant, and which it was certain would be awarded to it, could and would be paid by some financially responsible concern, as Mr. and Mrs. Smuckler were financially irresponsible [Tr. 139-54]. The witnesses from the May Company then orally testified, over objection and exception of counsel for defendant, that the May Company discontinued the sale of French Veneer upon receipt of the letter dated April 2, 1929, (Plaintiff's Exhibit 3,) and the discontinuance was kept up until 1931, when the name French Veneer was changed to French Polish [Tr. 155], that no complaints were made by the public that it was confused as to the buying of the product of the plaintiff or of the defendant, that plaintiff could always be reached, had not eluded anyone and the company did not hesitate to do business with her [Tr. 161-2], that they suggested to plaintiff that she change the name of her product to French Polish, that they had discussed with plaintiff the possibility of the placing of her merchandise in the other stores of the May Company but that the product was not thus placed for the reason that the May Company was "not wanting to buy litigation" [Tr. 163-65], and the decision to discontinue her product had no relationship to the merit of the product and that assuming there were no harassment of plaintiff's conduct and no threatening letters sent to her customers she could "have extended her business substantially beyond the bounds" that the witness knew it to be [Tr. 166].

The buyer in the household department of Young's Market Company testified he was with that company in

1928 and remained until November, 1931 and that French Veneer was put in for sale in 1928 [Tr. 174]. Upon receipt of the letter set out in plaintiff's complaint [Tr. 5 to 7] dated June 2, 1931, plaintiff's merchandise was taken out of stock [Tr. 178]. He then identified three other letters from defendant to Young's Market Company dated September 16, 1931 [Tr. 178], October 1, 1931, [Tr. 180], and October 16, 1931 [Tr. 182], to the admissibility in evidence of which defendant objected, the objections overruled, exception taken, and which were then admitted as plaintiff's Exhibits 14, 15 and 16, respectively. The tenor of these letters was that that defendant had information that Young's Market Company was selling "French Veneer" irrespective of the notice given to Young's Market Company that such sale was of an infringing product and requested the immediate discontinuance of such sale, and that unless such sale were discontinued it would be necessary for defendant in protection of its legal and trade rights in and to the name "Liquid Veneer" to bring action against the Smucklers and because of their financial irresponsibility, join in the action Young's Market Company so that when judgment for damages as well as injunction was obtained the damages could be collected from a financially responsible person or concern [Tr. 178 to 184]. During his experience in marketing polishes he had not found anything that came onto the market as quickly as French Veneer and at the time the threatening letter was received the sales on French Veneer were out-selling any other polishes in the house [Tr. 187-88]. No difficulty was had in locating Mrs. Smuckler by phone or mail when polish was needed [Tr. 188]. From June 2, 1931 until November, 1931, or possibly the first of September, 1931,

no French Veneer was sold in Young's Market Company [Tr. 189]. The names of Lena Smuckler, K. Smuckler and French Veneer appeared in different telephone directories of the Southern California Telephone Company from January, 1916, on to the date of trial. Part of the service was under "L. Smuckler", part under "K. Smuckler" and "French Veneer" was in the classified advertising section. There were about five different addresses during that time [Tr. 190]. One witness testified that about nine years ago she first bought French Veneer at the May Company and then purchased it from time to time until a few years ago when she went there and was told they no longer carried the product [Tr. 190]. When she recently asked for French Veneer she did not obtain it but French Polish was offered to her which she at first refused to buy and later did buy when the plaintiff told her it was the same as French Veneer and that she had had to change the name [Tr. 191]. A long number of years had elapsed between her purchases. The plaintiff testified she began manufacturing a furniture or automobile polish in 1910 in Portland, Oregon, and she about that time called it French Veneer [Tr. 192]. Her husband was ill and did not support the family of herself, husband and five children and her only income was from the sale of this product. She came to Los Angeles in 1915 and had a demonstration with Hamburgers. She traveled on the road making all of the cities and territories. She covered the states of Oregon, Washington and California and had close on to two thousand customers, who when they started to get threatening letters from defendant discontinued buying from her [Tr. 193] so she decided to stay in California. During her first few years in California she took in about \$1000.00 a

month [Tr. 194]; the cost of her product was 20% [Tr. 185] and that on an average it cost her \$400.00 to do a business of \$1000.00 a month [Tr. 196] netting \$600.00 a month. After 1929 her business began to fall off [Tr. 196]. She had no records to show the extent of her business because "a fire in my garage some time between 1921 and now destroyed most of my records" [Tr. 194]. In 1928 her gross business was approximately \$300.00 and \$400.00 a month and in 1929 it fell down and in 1930 to 1931 was almost completely fallen down [Tr. 198]. Her product was always manufactured in or on the premises where she resided except from 1920 to 1923 when she had a store in Los Angeles. She traveled over and made trips covering Southern California "up until the year of about 1930-1929 and 1930 and then when I would go out and these customers would say, 'I can't buy,' I just lost heart in it and I just quit because it is an expense to travel when you are not making anything" [Tr. 198]. She is still in business selling French Polish and a silver metal polish. She knew that after 1929 after the beginning of the depression all business fell off and that the depression still continued [Tr. 199].

The plaintiff then rested her case and out of the presence of the Jury, counsel for defendant made a motion for nonsuit during the midst of which counsel for plaintiff moved that paragraph VI of the complaint be amended to the effect that the letter was intended to refer to the plaintiff, Lena G. Smuckler, and which was granted over objection and exception of defendant [Tr. 201]. The motion for nonsuit was taken under submission. Leave was granted defendant to amend its answer to allege that the communication was privileged [Tr. 202]. Witness for the defendant testified that she was a sales lady and

demonstrator at the May Company demonstrating and selling property of the May Company including Liquid Veneer. To her knowledge during 1929-1930-1931 French Veneer was on sale at the May Company and the labels were not changed until 1933 [Tr. 203] when Mrs. Smuckler put a sticker labeled "Polish" over the word "Veneer" so that the label read "French Polish" [Tr. 204]. The trademarks of defendant to "Liquid Veneer" were introduced as defendant's exhibit [Tr. 205]. Plaintiff made a motion for directed verdict which was denied [Tr. 206-207] and the evidence being all in and the case closed, counsel for defendant renewed his motion to dismiss, which was denied [Tr. 207]. Proposed instructions were furnished by respective counsel, those proposed by defendant appearing at Transcript 208 to 212. The court in charging the Jury, defined libel in the language of the California Statute, stating also that "under the law an unprivileged communication as applied to this case is a communication made without malice" and that "if this were a legitimate trade necessity, a legitimate communication from one house to another and written in good faith and everything true in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good faith, though it be true, it is not privileged. If it is false, though it otherwise agree with the definition of 'privilege', it is not privileged" [Tr. 213-14]. The truth of the statements in the letter about the plaintiff moving from one place to another was discussed and also the fact that an

infringement of a trademark and right is a criminal offense and may be punished criminally [Tr. 214-215]. Having those things in mind, the jury was to determine if the plaintiff was exposed to hatred, contempt, ridicule or obloquy, or which caused her to be shunned or avoided, or which had a tendency to injure her in her business [Tr. 215]. Certain exceptions to the instructions of the court were taken by counsel for defendant, which were noted and the cause then submitted to the jury [Tr. 218-219]. It returned a verdict in favor of plaintiff assessing \$11,000.00 actual damages and \$9000.00 exemplary damages, making a total of \$20,000.00 [Tr. 220]. This judgment was entered on the 10th day of May, 1935 [Tr. 220]. Motion for new trial and for dismissal were served and filed on July 9, 1935 [Tr. 220], motion for new trial being based on the grounds:

- 1—The court had no jurisdiction over defendant;
- 2—The verdict of the jury was excessive and indicated passion and prejudice;
- 3—The evidence was insufficient to justify the verdict;
- 4—The court erred to the prejudice of defendant in making various rules during the course of the trial, and
- 5—The complaint still failed to state a cause of action [Tr. 220-221].

The motion to dismiss was made on the same grounds of lack of jurisdiction over the defendant, as set forth in the motion for new trial [Tr. 221]. Affidavit of Robert V. Jordan, Assistant Secretary of State, together with

photostatic copy of letter of attorney for plaintiff dated January 30, 1932, addressed to Secretary of State of California was filed in further support of the motion, said motion being also based upon all of the records, files affidavits and evidence in the cause [Tr. 221 to 224]. Prior to the hearing on the motion, defendant filed counter-affidavits in behalf of the superintendent of the warehouse of San Francisco who had previously made an affidavit herein, of purchasing agent of Kaufman Hardware Company in Los Angeles [Tr. 229], of one of the attorneys for the plaintiff [Tr. 231], and of the former secretary of the warehouse in San Francisco [Tr. 235], the affidavits of the superintendent of the warehouse [Tr. 225] and secretary [Tr. 235] generally stating that about May 4, 1932, defendant maintained in the warehouse a stock of merchandise, at which time it was transferred to G. A. Hosmer Co., and that the merchandise would remain stored until (1) — Orders were received from the defendant or G. A. Hosmer Co., or (2) — Customers on the accredited list of defendant or G. A. Hosmer Co. would call said warehouse company and request delivery of merchandise without direct order from the defendant, after which the warehouse company informed the defendant or G. A. Hosmer Co. of the request for and delivery of such merchandise to said customers [Tr. 226]; that there were varying amounts of defendant's merchandise on hand and on the specific dates set forth in the affidavits were in amounts of two cases, seven cases and twenty-three cases [Tr.

227]; that on May 4, 1932, the warehouse company received a letter dated April 30, 1932 from defendant instructing the warehouse to transfer all merchandise and records to the account of G. A. Hosmer Co. effective as of February 1, 1932. The affidavit of the purchasing agent of the Hoffman Hardware Company of Los Angeles generally stated that for the past six years it has purchased the merchandise of defendant, that E. C. Mack would solicit business for defendant, visiting a customer on an average of every two or three months; that generally orders for defendant's products would be mailed to the warehouse in San Francisco or to the traveling salesman at his San Francisco address; that rarely were orders sent directly to Buffalo or filled from merchandise sent from Buffalo, New York, and never was it necessary for his orders first to be approved by the Home Office in Buffalo, New York [Tr. 230]. Attached to the affidavit were six invoices of defendant showing office of defendant to be in Buffalo, New York, and bearing notations of "shipped from warehouse at San Francisco, Calif.," or "shipped from our warehouse at San Francisco, Cal."

Upon the hearing of said motions for new trial and dismissal defendant made a motion to strike from the files the affidavits filed by plaintiff subsequent to the entry of the judgment herein and which motion was denied, to which exception was taken [Tr. 239]. Later the Court denied, without comment or opinion, defendant's motion for new trial [Tr. 240].

SPECIFICATION OF ERRORS RELIED UPON.

FOR BREVITY AND CONVENIENCE APPELLANT WILL GROUP THE ERRORS RELIED UPON AND WILL THEN REFER TO THEM AS THEY APPEAR IN THE ASSIGNMENT OF ERRORS [Tr. 260-287].

I. Neither the Superior Court of the State of California nor the U. S. District Court for the Southern District of California has now nor ever has had jurisdiction over the defendant, a foreign corporation (New York), and the judgment is null and void.

1. Plaintiff did not comply with the requirements of Section 406a Civil Code of the State of California prior to making substituted service on defendant by serving Secretary of State of State of California, by failing to show that defendant had not designated an agent to accept service of process or that such agent could not be found at the address given with due diligence and hence service of process could be made upon the Secretary of State [A. E. 1, Tr. 260].
2. Plaintiff did not comply with the requirements of Section 406a of the Civil Code of the State of California prior to making substituted service on defendant by serving Secretary of State of the State of California, by showing that the President or other head of the corporation, a Vice President, a Secretary an Assistant Secretary, or its General Manager in said State could not be found after diligent search and hence that service of process could be made upon said Secretary of State [A. E. 2, Tr. 261].

3. Defendant foreign corporation was not “doing business” in California at the time of filing suit or of making the substituted service of process upon it by serving the Secretary of State, but was engaged solely in interstate commerce [A. E. 3-4, Tr. 261-62].

II. The District Court erred in making the following rulings:

1. As to the sufficiency of the complaint:

(a) By refusing to entertain or hear defendant’s motion made at the time of trial out of the presence of the jury and before any evidence was presented to dismiss plaintiff’s complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and which refusal to entertain or hear was on the ground that the motion was untimely made [A. E. 7, Tr. 263].

(b) By denying defendant’s motion made after the opening statement to the jury by plaintiff’s counsel to dismiss the complaint on plaintiff’s opening on the grounds that it did not allege jurisdictional facts, did not allege that the letter pleaded therein was “of and concerning the plaintiff”, did not allege that the pleaded letter was an unprivileged communication, to which denial exception was duly taken and noted [A. E. 8, Tr. 264].

(c) By overruling defendant’s objection made when the first witness for the plaintiff was called and sworn and stated her name, but before she gave any testimony, to the introduction of any evidence by the plaintiff upon the grounds that the complaint did not constitute a cause of action; the pleaded letter is a privileged communication; there was no allegation the pleaded letter was “of or concerning

plaintiff", her name not appearing in said letter; and that no element of damages was alleged, to which order exception was duly taken and noted [A. E. 9, Tr. 264].

2. As to the admissibility of evidence, and motions to strike same.

(a) By permitting the plaintiff to testify upon the re-opening of defendant's motion to quash service of summons to a conversation she said she had over two years prior thereto with a "bookkeeper" at the warehouse in San Francisco in which defendant stored some of its merchandise and to the effect that customers of defendant could come there and purchase Liquid Veneer and have it shipped to them, that she could purchase Liquid Veneer there and have it shipped to her address, that agents were there to take orders and would ship from the warehouse, and that Mr. Mack, a salesman for defendant, brought his orders there for shipment, all over the objection of defendant that said conversation was immaterial, incompetent and purely hearsay [A. E. 5, Tr. 262-63].

(b) By reserving a ruling on and refusing to grant defendant's motion to strike out the testimony of the plaintiff upon the re-opening of defendant's motion to quash service of summons to a conversation she said she had over two years before with a "bookkeeper" at the warehouse in San Francisco in which defendant stored some of its merchandise, to the effect that customers could come there, purchase Liquid Veneer and have it shipped to them, that she could purchase Liquid Veneer there and have it shipped to her address, that agents were there to take orders and would ship from the warehouse, and that Mr. Mack, a salesman for defend-

ant, brought his orders there for shipment, on the ground that said testimony appeared to be purely and entirely hearsay and a recital of statements from one on which no foundation was laid [A. E. 6, Tr. 263].

(c) By (1) admitting in evidence a copy of letter dated June 2, 1931, from defendant to Young's Market (plaintiff's Ex. 1) and set out in the complaint and stating in substance that defendant's inspector reports Young's Market to be selling a product called "French Veneer" and this letter is to inform it that defendant's attorney has advised that French Veneer was a violation of its trademark "Liquid Veneer" as well as its common law rights, that a Patent Attorney would inform Young's Market that the sale of an infringing product by a dealer is looked upon as contributory infringing and makes it equally liable with the manufacturer, that defendant has had more or less difficulty with the manufacturers of this French Veneer, has tried to purchase evidence against them but they have moved around from place to place, denying their identity and their financial condition has been found to be such as not to warrant litigation, that a manufacturer inducing a dealer to sell an infringing product sells the latter a law suit, that defendant is not in the business of suing people but must protect its property and requests the discontinuance of the sale of this infringing product, that if the manufacturer was desirous of building a business rightfully his own he could choose a name without taking part of a name belonging to defendant, who has spent a fortune in building up a business under it, that in adopting the name French Veneer the manufacturer is obviously trying to trade on the defendant's rights, and to which objection was made upon the ground that it

was incompetent, irrelevant and immaterial, that the original letter should be introduced and not a purported copy thereof, and to which ruling an exception was duly taken and noted [A. E. 11, Tr. 265].

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was made on the grounds that said letter was not a libel, that it was a privileged communication, that it did not mention or refer to the plaintiff and the complaint did not allege that the letter was of or concerning the plaintiff, and to which order exception was duly taken and noted [A. E. 12, Tr. 266].

(d) By (1) admitting in evidence a letter dated March 27, 1929, from defendant to *May Department Stores Co.*, (plaintiff's Ex. 2) and stating in substance that defendant had legal evidence that said company was handling French Veneer, that its attorney advises that French Veneer is a violation of its registered trademark "Liquid Veneer" as well as its common law rights and in handling the article the company was liable for damages with the manufacturer thereof, that its records show it has been difficult to meet the people in charge and because the sale was very meager the matter was allowed to rest for the time being, that now that the product has been found in the store of the company defendant is obliged to request the immediate stopping of the sale as were it not to do so it would jeopardize exclusive rights to its own trade-mark "Liquid Veneer", that defendant is not seeking trouble but must insist that its trade-mark and trade rights be respected which it intends to do in as friendly and business-like way as possible, and to which objection was made upon the ground the letter was irrelevant, incompetent and immaterial, inadmissible under the

pleadings, having no relation whatsoever to the cause of action, was not properly authenticated and was in no way relevant to the allegations of the complaint and to which ruling an exception was duly taken and noted [A. E. 13, Tr. 267].

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted [A. E. 22, Tr. 273].

(e) By (1) admitting in evidence a letter dated April 2, 1929, from the *May Company* to defendant (plaintiff's Ex. 3) stating in substance that the company had received a letter from defendant calling attention to the fact that French Veneer was infringing on defendant's rights and the company would from that day on discontinue the sale of French Veneer, to which objection was made on the grounds the letter was irrelevant, incompetent and immaterial, inadmissible under the pleadings, not binding upon the defendant, having no relation to this cause of action and that anything the writer thereof could have said therein would be hearsay, and to which ruling an exception was duly taken and noted [A. E. 14, Tr. 267].

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was made on the grounds that the letter was not the original and that it was hearsay, to which ruling exception was duly taken and noted. [A. E. 15, Tr. 268.]

(f) By (1) admitting in evidence a letter dated April 18, 1929, from defendant to the *May Company* (plaintiff's Ex 4), and stating in substance that

the letter of the May Company dated the 10th was received and that the reversal of the company of its decision to take the infringing French Veneer off sale was no doubt due to misinformation but if the defendant was not in error in this regard it would have no course but to prove its case in Court as otherwise it would jeopardize its valuable rights in its trade-mark "Liquid Veneer", that no such action heretofore has been filed against manufacturers of French Veneer as they could not be found and had no financial responsibility, but if the May Company decides to continue to market the product it would be joined in an action with the manufacturers thereof for it is a financially responsible company and could meet damages and costs which would be awarded the defendant, for one aiding or abetting the sale of an infringing product is equally liable with the manufacturer thereof, that matters of this kind become expensive and it is suggested that the May Company look into the matter a little closer, not take defendant's word for it but submit the question to a real Patent Attorney, that the May Company is a valued customer and defendant desires to give it every opportunity to know all the facts before coming to a decision which was being awaited as defendant could not afford to stand by and see its trade-mark and trade-rights disregarded, and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written three years prior to June 2, 1931, the date of the letter set forth in the complaint and the basis of this cause of action, was to a different concern from the letter set forth in the complaint and which is the basis of the cause of action, and has no bearing on any of the issues involved in this action,

and to which ruling an exception was duly taken and noted. [A. E. 16, Tr. 268.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(g) By (1) admitting in evidence a letter dated April 30, 1929, from defendant to the *May Company* (plaintiff's Ex. 5), and stating in substance that defendant had received a report from its representative that the May Company was continuing to sell French Veneer, thereby aiding and abetting an infringing manufacturer to palm off French Veneer for genuine Liquid Veneer, thereby injuring the defendant and being unfair to the public and requesting the withdrawal of the product from the market, and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written three years prior to June 2, 1931, the date of the letter set forth in the complaint and which is the basis of this cause of action, was to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted. [A. E. 17, Tr. 269.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(h) By (1) admitting in evidence a letter dated April 13, 1931, from the defendant to the *May Company* (plaintiff's Ex. 6) and stating in substance that the defendant wanted to know if the May Company now intended to renew its sale of French Veneer when that question had been settled about a year ago, that the sale had not been stopped through the manufacturer because he jumped from pillar to post and defendant was unable to put its finger upon him and his identity had been denied. that in view of the circumstances it was natural for it to protect its trade-mark rights by joining in an action a responsible house who sells the infringing article and since the May Company is a responsible house and sells the product the natural thing to do is to sue it, that law suits are expensive but if the May Company thinks the matter is worth its time defendant will have no alternative but to go ahead. that any suit commenced would be in the friendliest manner it could possibly have it because the May Company is considered a valued customer and friend, that the trade-mark "Liquid Veneer" is well established and has been adjudicated in the Courts and to permit French Veneer to infringe uninterrupted would be like acquiescing to its validity and others would begin jumping in the field and the first thing that would be known there would be all kinds of Veneers on the market, that if the May Company desires to handle French Veneer because it is a good product or for any other reason it should have the manufacturer adopt another name, that there are many good names which could be used for the polish, that the use of the word "Veneer" was for the purpose of trading on defendant's good will and name and defendant is duty bound to protect it, and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and in-

admissible, had been written prior to June 2, 1931, is to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted. [A. E. 18, Tr. 270.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(i) By admitting in evidence a letter dated April 23, 1931, from defendant to the *May Company* (plaintiff's Ex. 7), and stating in substance that defendant congratulated the May Company on its business judgment in deciding in the manner it had, that the May Company was misinformed when told that defendant's representative could lay his hands on the manufacturer of French Veneer as defendant had tried to buy evidence against the manufacturer but had failed to secure the evidence as they refused to sell their products to the defendant's representatives and denied their identity, that if the May Company cared to bother at all any further it might explain to the manufacturers of French Veneer that when defendant commences an action against them some reputable customer or distributor of their product will be joined in the suit so that whatever the manufacturers are unable to pay due to financial circumstances their distributor will make up for it and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written prior to

June 2, 1931, was to a different concern that the letter alleged in the complaint, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted. [A. E. 19, Tr. 271.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(j) By (1) admitting in evidence a letter dated May 1, 1931, by defendant to *May Company* (plaintiff's Ex. 8), and stating in substance that possibly the May Company is not aware that French Veneer is still on sale in one of its departments and after the demonstration thereof had been taken off, that defendant is not desirous of injuring anyone and if the manufacturer of the product wanted to go on doing business they should adopt a trade-name of their own which would be legal and build their own trade-mark or name as the defendant has done, that evidence is in hand to prove that French Veneer is confusing to the public, that defendant does not want to start litigation against the manufacturers for they are not financially responsible and defendant then would have to join a responsible concern, meaning expense and trouble for the customer, that it is for that reason the May Company would have to be joined in some such action, that a final settlement of the question would be appreciated, and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written prior to June 2, 1931, was to a

different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted. [A. E. 20, Tr. 272.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(k) By (1) admitting the evidence of Mr. Strauss, Vice-President of the *May Company*, that French Veneer was taken off sale by it in 1928 and kept off sale during 1929 and portion of 1930, and to which objection was on the ground that such acts occurred prior to the date of the letter in the complaint, dated June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 21, Tr. 273.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(1) By admitting into evidence letters from the defendant addressed to the *May Company*, and being Plaintiff's Exhibits Nos. 2, 4, 5, 6, 7, and 8, and all being dated prior to June 2, 1931, the date of the letter alleged in the complaint, on the theory that the basis of damage could include all of said previous letters, over defendant's objection and exception that the complaint alleged damages arising from only one let-

ter, to-wit: one dated June 2, 1931, and addressed to Young's Market Co., and that said letters to the May Company prior to said date therefore were incompetent, irrelevant, immaterial and inadmissible under the pleadings. [A. E. 24, Tr. 274.]

(m) By admitting the evidence of Mr. Strauss, Vice-President of the May Company to the effect, (1) That no complaints were made to him that the public was confused as to buying the product of defendant or the plaintiff, over the defendant's objection that the same was irrelevant, incompetent and immaterial, and to which ruling an exception was duly taken and noted. [A. E. 25, Tr. 274.]

(2) That he never had any complaints from customers or buyers or managers of departments, that there was no confusion in the minds of the public between the plaintiff's and defendant's products, over defendant's objection that said evidence was irrelevant, incompetent and immaterial, the question asked was leading and called for his conclusion, that said evidence had no bearing on the libel charged in the complaint, and to which ruling an exception was duly taken and noted. [A. E. 26, Tr. 274.]

(3) That in 1930 he suggested to the plaintiff that she should change the name of her product and restore it as French Polish because the demand for her polish was great and she had a customer following, over defendant's objection that said evidence was irrelevant, incompetent, immaterial and not binding on the defendant, and to which ruling an exception was duly taken and noted. [A. E. 27, Tr. 275.]

(4) That he contemplated placing plaintiff's products in other stores of the May Company, over defendant's objection that this evidence was speculative and not binding on the defendant, was incompetent, irrelevant

and immaterial, and to which ruling an exception was duly taken and noted. [A. E. 28, Tr. 275.]

(5) That plaintiff's product was not placed in other stores of the May Company because it was "not wanting to buy litigation", over defendant's objection that this evidence was irrelevant, incompetent, immaterial, called for the conclusion of the witness and was not binding upon the defendant to which ruling an exception was duly taken and noted. [A. E. 29, Tr. 275.]

(6) That the decision of the May Company not to place French Veneer in all the other stores of the May Company had no relationship to the quality or value of that product for sales purposes, over the defendant's objection that this evidence was irrelevant, incompetent and immaterial, inadmissible under the pleadings and not binding on the defendant, to which ruling an exception was duly taken and noted. [A. E. 30, Tr. 275.]

(7) That in answer to a hypothetical question that assuming from his experience as a merchandiser for thirty years and his intimate knowledge of the plaintiff's product and its competitive quality compared with other products of the same type and his personal knowledge of the plaintiff in a business relationship from his experience with her, and assuming that there were no harassment of her conduct, no threatening letters were sent to her customers by the defendant, he would say that the plaintiff could have extended her business substantially beyond the bounds that he knew it, over the defendant's objection that it was irrelevant, incompetent, immaterial and not proper, that the witness was not properly qualified, that there was no evidence on which to base any such hypothetical question, that it called for the witness' conclusion and was speculative, and which objection was overruled and

to which ruling an exception was duly taken and noted. [A. E. 31, Tr. 276.]

(n) By admitting in evidence a copy of letter dated April 10, 1929, from the May Company to defendant (plaintiff's Ex. 13), stating in substance that the plaintiff and her son had called on the May Company, that it did not consider French Veneer an infringement on Liquid Veneer, that the owners of French Veneer had been in the 'phone book for a number of years and their addresses could be obtained through the May Company, that plaintiff's son was an attorney located in a building in Los Angeles, and that the May Company was going to change its mind and sell French Veneer until such time as defendant could show that it had an order restraining the plaintiff from selling her product and which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial, hearsay, not the best evidence, and inadmissible under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 32, Tr. 276.]

(o) By admitting the evidence of Mr. Max, of the *May Company*, to the effect:

(1) That plaintiff's product was taken off sale at the May Company upon receipt of letter from defendant, dated March 27, 1929 (plaintiff's Ex. 2) and kept off until 1930, when French Polish was substituted for French Veneer, over defendant's objection that any transactions between plaintiff and the May Company were absolutely incompetent, irrelevant, immaterial because the letter forming the basis of this action is addressed to Young's Market Co., and is dated June 2, 1931, and that transactions with the May Company, or any other company, prior to June 2, 1931, would have no bearing upon the allegations

of the complaint and were therefore irrelevant, incompetent and immaterial, to which ruling an exception was duly taken and noted [A. E. 33, Tr. 277.]

(2) That he never received any complaint from anyone that there was any palming off of plaintiff's product for defendant's product, over defendant's objection that any transaction between the plaintiff and the May Company was incompetent, irrelevant and immaterial since this action was based on a letter to Young's Market Co., dated June 2, 1931, to which ruling an exception was duly taken and noted. [A. E. 34, Tr. 277.]

(p) By admitting in evidence a letter from defendant to Young's Market Co., dated September 16, 1931, (plaintiff's Ex. 14) stating in substance that defendant could no longer wait for a reply to its legal notice and friendly explanation of its position concerning the sale of the infringing product, French Veneer, that if its sale is immediately stopped the defendant would release Young's Market Co. from all claims for past infringements and in doing this the defendant was extending a favor for litigation becomes very expensive, that silence to the offer of defendant would leave it no alternative but to place the entire matter in the hands of its attorneys, and which objection was on the ground that said letter was irrelevant, incompetent, immaterial, hearsay, not the best evidence and inadmissible under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 36, Tr. 278.]

(q) By admitting in evidence a letter from defendant to Young's Market Co., dated October 1, 1931 (plaintiff's Ex. 15) stating in substance that defendant would have established its rights in Court against the Smucklers had they not denied their identity,

moved from place to place and made it difficult for defendant to pin them down and obtain evidence against their unlawful practice, that besides they were not financially responsible and when an action is to be started against them some reputable company selling their products and thereby aiding the infringer will be joined to pay the costs and damages, and such action will be commenced against Young's Market Co., if it insists on aiding and abetting this infringer, that defendant would spend thousands of dollars on its trade rights but not five cents in tribute, and which objection was made on the ground that said letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 37, Tr. 279.]

(r) By admitting in evidence a letter from defendant to Young's Market Co., dated October 16, 1931 (plaintiff's Ex. 16) stating in substance that in reply to the belief of the Young's Market Co., that the Smucklers were not infringers that Young's Market Co., on consulting with a reputable Patent Attorney would find that French Veneer is an infringement of the trade-mark and name "Liquid Veneer" and besides constituted unfair competition, that the Smucklers are guilty on two counts and liable for all they have sold in the past and Young's Market Co. is equally guilty with them as a distributor and if it desires to continue the sale of French Veneer it will be necessary to commence an action against it in the United States District Courts, that in the United States District Court in Cincinnati, Ohio, it was held that "20th Century Veneer Gloss" was an infringement of its name and which should be considered as a substantial precedent, that the defendant will be glad

to forward to the attorney for Young's Market Co. a copy of the decree of the Court in the matter of the case of the 20th Century Veneer Gloss, that the defendant is trying to save the Young's Market Co. from difficulty or expenditures but if it must go into Court to settle the matter it is going to demand damages for every bottle sold by the company and every bottle manufactured by Smucklers, which objection was made on the ground that said letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 38, Tr. 279.]

(s) By (1) admitting the evidence of Mr. Waddington, an employee of Young's Market Co., in answer to a hypothetical question "As a merchandising man with experience of over forty years, I think you said, Mr. Waddington, and with your knowledge of this product and with your knowledge of how it sold at Young's Market in comparison with so-called well-established products, would you say that . . . if it were allowed to develop normally, would you say that the plaintiff's product could be expanded into a large profitable business?", over defendant's objection that it called for the conclusion of the witness, for a speculative answer, and that there was no basis for such a hypothetical question, to which ruling an exception was duly taken and noted. [A. E. 39, Tr. 280.]

(2) By refusing to strike the evidence of Mr. Waddington, employee of Young's Market Co. in answer to the hypothetical question that with his knowledge of the plaintiff's product and how it sold in comparison with so-called well-established products and assuming it were allowed to develop normally would he say that plaintiff's product could be expanded into a

large profitable business and in answer to which he stated that during his experience in marketing polishes of this sort he had never at any time found anything that came onto the market as quickly as this French Veneer and that at the time the threatening letter was received French Veneer was far outselling any other polish in the house and it was just like cutting it off with a knife, that it stopped all at once as a result of said letter, and which motion to strike was made on the ground that the witness was dissertating upon the qualities of French Veneer and characterizing the effect upon his business of said letter, that said dissertation of quality was outside the issue of this law suit, to which ruling an exception was duly taken and noted. [A. E. 40, Tr. 281.]

(t) By admitting the evidence of Winifred M. Jacobs to the effect that when she recently asked for French Veneer at the May Company she was offered French Polish which she at first refused to buy until the plaintiff told her it was the same as French Veneer, over defendant's objection that such evidence was irrelevant, incompetent, immaterial and in no way binding upon the defendant nor within the issues of the pleadings as to what said witness would do, that it was not within the elements of a libel, was purely speculative on the part of the witness and was entirely without the issues of the case, to which ruling an exception was duly taken and noted. [A. E. 41, Tr. 281.]

(u) By admitting the evidence of plaintiff that after the first letter to the May Company from defendant in 1929 her business fell off to almost nothing, over defendant's objection that such evidence was irrelevant, incompetent and immaterial under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 42, Tr. 282.]

3. As to motions made:

(a) By overruling defendant's objection to the amendment suggested by the Court and proposed by the plaintiff after the first witness for the plaintiff was called, that a clause reading "and has at all times hereinafter mentioned been doing business in the State of California" be added to paragraph II of the complaint, on the ground that said amendment created a cause of action that had not thereto existed as the complaint lacked sufficient jurisdictional allegations and the proposed amendment injected entirely new matter into it to which order exception was duly taken and noted. [A. E. 10, Tr. 264.]

(b) By denying defendant's motion for a nonsuit and for dismissal of the action after all of the evidence was in and the case closed and made upon the grounds that the plaintiff had failed to establish any cause of action against the defendant, that the complaint fails to allege a cause of action, that the letter of June 2, 1931, addressed to Young's Market Co., and the basis of the complaint, is a privileged communication from a party interested in the subject of the communication to a distributor who is likewise interested, that the plaintiff is not named in the communication, there is no allegation in the complaint which alleges that the letter was written of or concerning the plaintiff, to which ruling an exception was duly taken and noted. [A. E. 43, Tr. 282.]

(c) By permitting the plaintiff, after the close of her case and in the midst of defendant's argument on a motion for non-suit on the grounds, among others, that the complaint did not allege nor did the facts prove a cause of action, to amend her complaint to the effect that the letter alleged in paragraph VI "was intended to refer to the plaintiff, Lena G.

Smuckler", over defendant's objection to the allowance of the amendment at the stage in the case when the plaintiff's case was closed, to which ruling an exception was duly taken and noted. [A. E. 44, Tr. 282.]

III. The District Court erred in prejudicially commenting and remarking in the presence of the jury:

1. With respective counsel respecting the admissibility of the letters addressed to the May Company, dated May 27, 1929, April 18, 1929, April 30, 1929, April 13, 1931, April 23, 1931, and May 1, 1931, respectively and all prior to the date of the letter alleged in the complaint, to-wit: June 2, 1931, that in the absence of a specific objection heretofore made by defendant as to what was included in or for an analysis of the complaint, the Court was compelled to say that the basis of damage may reasonably be held to include all of the previous letters, to which statement an exception was duly taken and noted. [A. E. 23, Tr. 273.]
2. In colloquy with counsel for defendant upon objection of said counsel to a question asked Mr. Waddington, a witness for plaintiff, on direct examination and an employee of Young's Market Co., if the original letter of Plaintiff's Ex. 1 was received by him, and which objection was made on the ground that the complaint did not allege that the letter was received by Young's Market Co., the Court stating, questioning and arguing that did counsel not know that the answer admitted writing the letter but denied it was written for the purpose of injuring the plaintiff; that counsel's statement, he did not believe himself in a position to deny that the letter was written, was exactly what the Court wanted, that counsel's posi-

tion will thenceforth be the observance of the rule prevailing in that Court and in all business or trials, that when there is an open and evident fact it will not be denied, that this Court and trial from the beginning has been delayed by technical—and the Court would not otherwise describe it—questioning as to whether said letter was written, that if the letter was written let's have it admitted, the Court did not want to hear any more of it during the trial, that the Court certainly took the statement made the day before by counsel that he did not have a copy of the letter as a denial that the letter had been written and that counsel's whole conduct was a denial that the letter had been written, and to which statements and remarks exception was duly taken and noted. [A. E. 35, Tr. 277.]

IV. The District Court erred in his charge to the jury:

1. By instructing it that "under the law an unprivileged communication as applied to this case is a communication made without malice", over defendant's objection and except that the Court had apparently misspoken in defining a privileged communication. [A. E. 45, Tr. 283.]
2. By failing and refusing to correct what was apparently a misstatement when it instructed the jury that "under the law an unprivileged communication as applied to this case is a communication made without malice", over defendant's objection and exception and after the attention of the Court to the same had been called. [A. E. 46, Tr. 283.]
3. By instructing the jury that "if malice exists then privilege cannot be claimed. 'To a person interested therein', that is, interested in the communication. It

might reasonably be said that the Young Company or the May Company—the Young Company this letter was addressed to, I believe—was interested in the subject. ‘By one who is also interested’. That would be the Liquid Veneer Corporation. ‘Or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent or was requested by the person interested to give the information’. In other words, if this were a legitimate trade necessity, a legitimate communication from one business house to another and written in good faith and everything true in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good faith, though it be true, it is not privileged. If it is false, though it otherwise agrees with the definition of ‘privilege’, it is not privileged”, and to which defendant took exception on the ground that if the communication from which the Court read is privileged, then though the matters therein stated were false or uttered under a mistaken belief, it still remains privileged. [A. E. 47, Tr. 283.]

4. By instructing the jury, after reading portions of the letter dated June 2, 1931, set forth in the complaint that, “Now, gentlemen, consider seriously whether those statements are true. You are at liberty to and should contrast that with the statement of the witness here that the telephone of this woman was in the telephone directory throughout the time. I think the representative of the Young store said he had never any difficulty—in fact, both witnesses stated they had never any difficulty in finding her. And you will thereupon conclude whether that is a true statement”, and to which defendant took exception on the grounds that if the communication is

privileged, even though the matters stated were false or uttered under a mistaken belief, it still remains privileged. [A. E. 48, Tr. 284.]

5. By instructing the jury, after reading a portion of the letter dated June 2, 1931, and set forth in the complaint, "Speaking again of the manufacturer of French Veneer, the letter goes on to say: 'His object for adopting the name French Veneer is obvious. He is trying to trade on our rights.' That, I think, as counsel stated, if a fact, is a criminal offense and infringement under the federal statutes. Infringement of an interstate trade-mark may be punished criminally. Now, having all of those things in mind, you will make up your minds whether this exposes the plaintiff to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business. As a matter of fact, a substance which is of general knowledge, like wood, iron, paint, that in and of itself is not the subject of the exclusive appropriation of anybody as a trade right. You sell a certain kind of oatmeal or what not, naturally, of course, nobody can claim an exclusive right in a generic name of a well-known material exclusively. The combination only may be appropriated. The right in a trade-mark is based upon the tendency to deceive the public; that one will sell his own goods to the public intending and under conditions where the public believe them to be the goods of someone else.", to which defendant took exception on the ground that the Court was submitting to the jury the question of infringement whereas the defendant had a trade-mark and what it believed was its right under that trade-mark was the only thing pertinent in this action. [A. E. 49, Tr. 284.]

6. By refusing to instruct the jury to return a verdict in favor of the defendant as requested by it upon the close of the case, and to which refusal exception was duly taken and noted. [A. E. 50, Tr. 285.]
7. By refusing to instruct the jury as requested by defendant that, "as a matter of law, communications relied on by plaintiff in this action are privileged communications and that, therefore, plaintiff cannot recover unless she proves by a preponderance of the evidence that said publication or publications, even though false, were sent out by the defendant with malicious intent. Malice is a desire and disposition to injure another founded upon spite or ill-will. Therefore, if you should find that the alleged publications even though false were not founded upon enmity to the plaintiff but were made with the sole desire on defendant's part to protect its own interests, then your verdict must be for the defendant.", and to which refusal exception was duly taken and noted [A. E. 51, Tr. 285.]
8. By refusing to instruct the jury as requested by defendant that, "If you find the statements in the alleged libelous publications to be true, then your verdict must be in favor of the defendant. In this connection the letters relied upon by plaintiff state that plaintiff was infringing its registered trade-mark. You are instructed that, if defendant honestly believed that plaintiff was an infringer, said statements were and are not libelous.", and to which refusal an exception was duly taken and noted. [A. E. 52, Tr. 286.]

V. The verdict of the jury awarding plaintiff \$11,000.00 as actual or compensatory damages is not supported by any substantial evidence but is so large that

it indicates gross error and disregard of the evidence and the jury was actuated by improper motive or by passion or prejudice in arriving at its verdict. [A. E. 53, Tr. 286.]

VI. The verdict of jury awarding plaintiff \$9,000.00 punitive damages is:

1. Wholly erroneous as the complaint contains no allegation relating to exemplary damages. [A. E. 54, Tr. 286.]
2. Not supported by any evidence but indicates gross error and disregard of the evidence by the jury and that it was actuated by improper motive or by passion or prejudice against defendant in arriving at its verdict. [A. E. 55, Tr. 287.]

VII. The evidence is insufficient to sustain the verdict of the jury and the judgment thereon. [A. E. 56, Tr. 287.]

VIII. The District Court erred and abused its discretion in denying defendant's motion for new trial which was made and particularly urged on the ground that the Court at no time has had jurisdiction over defendant, a foreign corporation (N. Y.) because the records in this case affirmatively show that it was served on March 1, 1932, by serving Summons and copy of complaint upon the Secretary of State of the State of California, and that said records further affirmatively show that on said date, prior thereto, at the times the motion to quash was filed and heard and at the present time there has been no compliance by the plaintiff with the requirements of section 406a of the Civil Code of the State of California, that plaintiff could not find, after diligent search, neither the president nor other head of the corporation, a vice-

president, a secretary, an assistant secretary, or general manager, if any, in this state, before process was or could be served upon the Secretary of State of the State of California, and the records in this case further affirmatively show that on said March 1, 1932, and at the time of the filing of the Motion to Quash and its submission to the Court for decision, the plaintiff failed to comply with the requirements of section 406a of the Civil Code of the State of California by showing that no person had been designated as the agent for defendant for the service of process or had been authorized to receive service of process on its behalf, or if such agent had been designated he could not be found with due diligence before process was or could be served upon the Secretary of State of the State of California, and which Motion was made upon all of the files and records in this proceeding. [A. E. 57, Tr. 287.]

IX. The District Court erred in denying defendant's Motion to Strike from the files the affidavits filed by plaintiff in defense of defendant's Motion to Dismiss, of John Brash, Byron Jack Badham, Jr., and Isador I. Smuckler, filed on the 26th day of July, 1935, and of J. W. Howell, filed on August 14, 1935, and made on the grounds that the said affidavits were incompetent, irrelevant and immaterial and there was nothing before the Court at said hearing to which said affidavits did or could refer or pertain and to which ruling an exception was duly taken and noted. [A. E. 58, Tr. 288.]

ARGUMENT.

I.

NEITHER THE SUPERIOR COURT OF THE STATE OF CALIFORNIA NOR THE UNITED STATES DISTRICT COURT EVER HAD, NOR NOW HAS, JURISDICTION OVER DEFENDANT, BECAUSE THERE WAS NO VALID SERVICE OF PROCESS ON DEFENDANT.

The defendant, a New York Corporation, was sued in the Superior Court of the State of California in and for the County of Los Angeles. [Tr. 3.] Counsel for plaintiff attempted to serve process on defendant by mailing to the Secretary of State of State of California duplicate copies of complaint and summons and fee of \$5.00. His letter of transmittal reads as follows [Tr. 224]:

“January 30th, 1932.

Secretary of State,
Sacramento, California

Dear Sir:—

Enclosed herewith are duplicate copies of complaint and summons in the case of Lena G. Smuckler, doing business as French Veneer Manufacturing Company, plaintiff vs. Liquid Veneer Corporation, a corporation, defendant, together with a fee of \$5.00.

The corporation has as its Pacific Coast representative, Mr. C. E. Mack, 1890 Grove Street, San Francisco, California, and the principle place of business of said corporation is Buffalo, New York.

Please issue your usual certificate and return to me.

Very truly yours,
ELIJAH M. SMUCKLER.”

The Secretary of State by a certificate dated the 2nd day of March, 1932, acknowledged receipt of said copies of complaint and summons and statutory fee as of the 1st day of March, 1932, and certified that he advised the defendant corporation at the addresses furnished in the letter of counsel for plaintiff, by prepaid telegram, of the fact of the service of said duplicate copy of complaint and summons upon him and that he deposited in the United States Post Office at Sacramento, California, said copies in sealed envelopes with postage prepaid, by registered mail, and addressed to defendant at said addresses, and further certified that the records of his office did not contain the name of defendant corporation, or show the location of its offices. [Tr. 67-68.] No affidavit, statement, or other document prior to, at the time of, or subsequent to, the mailing of said duplicate copies to the Secretary of State, on behalf of the plaintiff, her attorneys or any other person, was filed with the clerk of said Superior Court showing the non-existence of a person or agent designated by defendant for service of process or authorized to receive service of process on its behalf, or if such person were designated, that he could not be found at the address given with due diligence, or that the president or other head of the corporation, vice-president, secretary, assistant secretary or general manager in the State of California could not be found after diligent search. [Tr. 23.] Neither at any time by any person has the plaintiff filed with the United States District Court or the clerk thereof, any affidavit, statement or other document setting forth the non-existence of these facts. Appellant respectfully insists that service of process upon a foreign corporation by serving the Secretary of State of the State of California is conditional upon the non-existence of the afore named

facts and that such non-existence must affirmatively appear in the records and proceedings of the case before service of process may be attempted upon the Secretary of State, and that since the non-existence of said facts was not shown or demonstrated by plaintiff prior to or at the time of attempted service upon the Secretary of State, nor has she since shown the non-existence of said facts, neither the State or Federal Court ever acquired jurisdiction over the defendant, all proceedings in this case being a nullity and the judgment rendered being absolutely void.

1. The Applicable Code Sections of the State of California in Effect at the Time the Complaint Was Filed and Process Forwarded to the Secretary of State of the State of California Are:

Section 411 of the Code of Civil Procedure provides:

“The summons must be served by delivering a copy thereof as follows:

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, *doing business in this state*; in the manner provided by section 406a of the Civil Code.”

Section 412 of the Code of Civil Procedure provides:

“Where the person on whom service is to be made . . . is a corporation having no officer or other person upon whom summons may be served, who, after due diligence can(not) be found within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a

necessary or proper party to the action . . . such court, judge, or justice, may make an order that the service be made by the publication of the summons; provided, that where service is sought to be made upon a person by publication upon the ground that he cannot, after due diligence, be found within the state, it must first appear by the affidavit aforesaid that there has not been filed, on behalf of such person, either in the county in which such action was brought, or in the county in which such action is pending, the certificate of residence provided for by section 1163 of the Civil Code; or that said certificate was so filed and that the defendant can not be found at the place named in said certificate, which later fact must be made to appear by the certificate of the sheriff, or a constable or marshall of the county wherein said defendant claims residence in and by said certificate of residence, and which certificate of said sheriff, constable or marshal must show that service of said summons was attempted upon said defendant at the place named in said certificate of residence but that said defendant was not to be found thereat.”

Section 1163 of the Civil Code provides:

“Any person, firm, or corporation, may record in the office of the county recorder of any county in the State of California a certificate setting forth the name of said person, firm, or corporation, and the place of residence of said person, firm, or corporation, and the place where service of summons may be made upon said person, firm or corporation. The said certificate must be verified by the oath of the person, or of a member of the firm, or officer of the corporation making the same, and may be recorded without acknowledgment. Such person, firm or corporation may upon a change of place of residence file affidavit as herein

provided and such last affidavit filed shall be the place designated as the place where service of summons may be made as herein provided. The fee of the recorder for recording said certificate shall be fifty cents; and the recorder shall keep in his office an index entitled 'Index to Certificates of Residence,' in which must be entered the name of the person, firm, or corporation in whose behalf said certificate was filed."

Section 405 of the Civil Code provides:

"In this chapter the term 'foreign corporation' means a corporation not incorporated under the laws of this state. . . . No foreign corporation shall transact intrastate business in this state or enter into repeated and successive transactions of its business in this state, other than interstate or foreign commerce, until it has filed with the Secretary of State a copy of its articles duly certified by the Secretary of State or other proper official of the government under the laws of which it was created . . . and a statement setting forth:

(1) The location and address of its principal office;

(2) The location and address of its principal office within this state;

(3) The name of some person residing within the state upon whom process directed to such corporation may be served, and his complete business or residence address, which must be in the county in which the principal office of the corporation in this state is to be located;

(4) Its irrevocable consent to such service, and to service of process on the secretary of state, in the event that the agent so designated or his successor is no longer authorized to act or cannot be found at the

address given. A copy of such articles, and any translation thereof, duly certified by the secretary of state of this state, must be filed with the county clerk of this county in this state in which the principal office of the corporation is located, and with the county clerk of any other county in this state in which the corporation owns real property.

There shall be paid to the secretary of state a fee of one hundred dollars for filing such certified copy of the articles and a fee of five dollars for filing such statement.

Corporations organized for educational, religious, scientific or charitable purposes, and not issuing shares, and foreign nonprofit corporations, shall pay a fee of five dollars for filing their articles."

Section 406a of the Civil Code provides:

"Process directed to any foreign corporation may be served on the person so designated as its agent for service of process or authorized to receive service of process, or the president or other head of the corporation, a vice president, a secretary, and assistant secretary, the general manager in this state, or the cashier or assistant cashier of a bank; in the event that no agent so designated can be found at the address given with due diligence, *or if no person has been designated and if no one of the foregoing officers or agents of the corporation can be found after diligent search*, then on the secretary of state. A copy of such designation, certified by the secretary of state,

is sufficient evidence of the appointment of such agent for the service of process.”

“Whenever process against a foreign corporation is served upon the secretary of state such service shall be made by delivering to the secretary of state, or to an assistant or deputy secretary of state, duplicate copies of such process, and a fee of five dollars, and, if the corporation has not filed with the secretary of state the statement required by section 405, there shall also be delivered to the secretary of state a statement of the address of such corporation to which notice, and a copy of such process, shall be sent. Upon receipt of such process and fee the secretary of state shall forthwith give notice to the corporation by telegraph, charges prepaid, both to its principal or home office and to its principal office in the state, of the service of such process, and shall forward to each of such offices by registered mail, a copy of such process, or in case he has no record of such corporation or such offices, then such notice shall be telegraphed and such copies shall be mailed to the corporation, at the address given in the statement delivered to the secretary of state at the time of such service. The corporation shall appear and answer within thirty days after the secretary of state gives notice as aforesaid. The certificate of the secretary of state, under his official seal, of such service shall be competent and sufficient proof thereof. The secretary of state shall keep a record of all process served upon him and shall record therein the time of such service and his action in respect thereto.” (*Italics ours.*)

Section 407 of the Civil Code provides:

“The requirements of this chapter as to foreign corporations shall not apply to corporations engaged solely in interstate or foreign commerce.

“No foreign corporation need comply with the requirements of this chapter merely because a subsidiary corporation owned or controlled by it is engaged in the transaction of intrastate business in this state.”

Section 406a, above set forth, was amended in 1933, Ch. 533, Section 91, so as to clarify somewhat the language of the statute and the first paragraph above set forth was amended to read as follows:

“Service of process. Process directed to any foreign corporation may be served upon such corporation by delivering a copy to the person designated as its agent for service of process or authorized to receive service of process, or to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the general manager in this State, or the cashier or assistant cashier of a bank. In the event that no agent so designated can be found with due diligence at the address given, or if the agent so designated be no longer authorized to act, or if no person has been designated and if no one of the foregoing officers or agents of the corporation can be found after diligent search, then service shall be made by delivery to the Secretary of State or to an assistant or deputy Secretary of State. A copy of such designation, certified by the Secretary of State, is sufficient evidence of the appointment of such agent for the service of process.”

2. Service of Process Upon a Foreign Corporation by Serving the Secretary of State Is Constructive Service and the Authority for It Must Be Strictly Followed:

The Holiness Church of San Jose v. Metropolitan Church Assn., et al, 12 Cal. App. 445 at 448;

Winston v. Idaho Hardwood Co., 23 Cal. App. 211;
21 R. C. L. 1280;

14a Corp. Jur. p. 1416, Sec. 4142.

In *Holiness Church of San Jose v. Metropolitan Church Assn.*, *supra*, in considering the character of service effected upon a foreign corporation by serving the Secretary of State of State of California, the California District Court of Appeal stated:

“The expression ‘personal service,’ generally speaking, means the actual delivery of the process to the defendant in person (*First Nat. Bank of Casselton v. Holmes*, 12 N. D. 38, (94 N. W. 764); *Moyer v. Cook*, 12 Wis. 335; *McKenna v. State Ins. Co.*, 73 Iowa, 453, (35 N. W. 519); and such service, under section 411, subdivisions 1 and 2, Code of Civil Procedure, is made upon a corporation, domestic or foreign, by delivering a copy of the summons, together with a copy of the complaint, on certain designated officers thereof, or, if upon a foreign corporation under section 405 of the Civil Code, by delivering copies of the complaint and summons to a person resident within the state designated for that purpose by such corporation. Other modes of service on corporations in this state, including the one in question, must, we believe, be regarded as constructive.”

In *Winston v. Idaho Hardwood Co.*, *supra*, a judgment by default against defendant foreign corporation obtained after service of process upon the Secretary of State without a showing of such facts as would authorize the service of summons upon the corporation by delivering it to the Secretary of State was set aside and reversed because

“There are no allegations in the complaint of any facts which would authorize the service of summons upon the corporation by delivering it to the Secretary of State; nor was there, as shown by the record, any competent proof of the existence of such facts offered at the trial.”

In 14a *Cor. Jur.* p. 1416, Sec. 4142, we read:

“Unless provided otherwise by statute there must be personal service as distinguished from service by leaving a copy. Under the statutes of some states personal service upon a foreign corporation is made by delivering a copy of the summons, together with a copy of the complaint, to one of certain officers of the corporation designated by statute or to a person designated by the corporation, in compliance with statutory provisions, as an agent to receive service of process; *all other modes of service, including service on the secretary of state in the absence of a statutory designation by the corporation of an agent to receive service of process, must be regarded as constructive.* In such states service of process upon the secretary of state is regarded as a substitute for service by publication.” (Italics ours.)

3. **The Supreme Court of California Has Unequivocally Decided That Where Service Upon the Secretary of State Is Conditional Upon the Non-Existence of Certain Facts, Such Non-Existence Must First Affirmatively Appear in the Record as Otherwise the Court Obtains No Jurisdiction Over the Defendant.**

In *Willey v. The Benedict Company*, 145 Cal. 601, the action was in the Superior Court in San Francisco against a foreign corporation. Summons was delivered to the sheriff of Sacramento County, who returned he had served it on defendant, "a foreign corporation, doing business in the State of California, defendant therein named, by handing to and leaving with C. F. Curry, secretary of state of the state of California, a copy of said summons" and a copy of the complaint. Motion of the defendant to vacate the service of summons and complaint and to set aside its default and the judgment entered on the ground that the court had acquired no jurisdiction of the person of defendant as there had been no legal or valid service upon it of the summons and complaint was granted and on appeal, sustained. In a clear and complete discussion of the necessity of showing the non-existence of certain facts required by the statute before service of process on a foreign corporation may be validly made by delivering the same to the Secretary of State of State of California, the court stated:

"The service of the summons was made, and its sufficiency is attempted to be sustained under the provisions of section 1 of an act amending 'An act in relation to foreign corporations,' passed in 1899 (Stats. 1899, p. 111), which provides, in effect, that every foreign corporation doing business in this state shall, within a specified time after commencing busi-

ness here, designate some person residing in the state upon whom process may be served, and file such designation in the office of the secretary of state, in which case it shall be lawful to serve the process upon such designated person, and, in the event no such person is designated, then service shall be made on the secretary of state.

It will be noted that this provision is a *radical departure from the ordinary method of procedure whereby jurisdiction is obtained over a defendant, and for that reason, having due regard for the protection of the personal and property rights of a defendant, before a court can assume jurisdiction of him under the substituted process it provides for, a strict compliance with its provisions must be insisted on.*

It is said: 'Substituted service in actions purely *in personam* is a departure from the rule of common law, and the authority for it must be strictly followed. Therefore, the existence of the conditions upon which the validity of such service depends must be shown affirmatively by the return and cannot be inferred.' (18 Ency. of Plead. & Prac. 932.)

Now, to apply this rule to the substituted service of the summons in the case at bar, as the return of the sheriff discloses it to have been made:

It will be observed that section 1 of the statute above referred to requires every foreign corporation doing business in this state to designate, by filing such designation in the office of the secretary of state, a person upon whom process may be served, and when so designated the process shall be served on him, *and it then declares that where no such person is designated the required service may be made upon the secretary of state.* It provides, in any event, for the service upon some one, but as to that service, in as far

as making it on the secretary of state is concerned, the *statute prescribes a condition—namely, that the records of the office of the secretary of state disclose that no person has been designated by the corporation for that purpose.* If there is a designated person, service must be made on him; if there is none, then on the secretary of state—but the right to serve the latter is conditioned solely on the non-existence of the former.

When we examine the return of the sheriff (and we have recited above its essential particulars), we find an entire absence of any recital upon the subject, as to whether the defendant foreign corporation had filed any designation of a person to be served. The only statement is, that he served the summons on the secretary of state. *But as by the terms of the statute there was no authority to serve the secretary of state, unless it appeared that there was no designation of a person on file in his office, the return of the sheriff should have shown the existence of this condition, upon which alone service on the secretary of state could be either authorized or sustained.* If it was a fact that no designation had been made, it should have been contained in his return, and his failure to so make it renders the return insufficient to show that any such service had been made as would give the court jurisdiction of the defendant.

In *Works on Courts and Their Jurisdiction* (p. 291) it is said: ‘Where service is allowed on one person only where some other person cannot be found, the proof of service must, where service is made on the second person, show that the first could not be found. In other words, where service is allowed to be made on a particular person or officer only on condition, the return must show the existence of the condition, or it is insufficient.’ (Italics ours.)

4. Rule Requiring Showing Non-Existence of Certain Facts Before Service of Process on a Foreign Corporation Can Be Made Upon Secretary of State to Give the Court Jurisdiction of the Person of the Defendant Is Universally Approved by the Federal and State Courts.

(a) The Supreme Court of the United States has considered this question and establishes the above rule. Some of the leading cases in support thereof are the following:

Galpin v. Page, 18 Wall 350-375 (1873), 21 L. Ed. 959;

Earle v. McVeigh, 91 U. S. 503, 23 L. Ed. 398;

Applegate v. Lexington & C. County Min. Co., 117 U. S. 255, 29 L. Ed. 892;

Settlemier v. Sullivan, 97 U. S. 444 (1878), 24 L. Ed. 1110;

Cheely v. Clayton, 110 U. S. 701 (1883), 28 L. Ed. 298;

Amy v. City of Watertown, 130 U. S. 301 (1888), 32 L. Ed. 946;

Dick v. Foraker, 155 U. S. 404 (1894), 39 L. Ed. 201;

Guaranty Trust & Safe Deposit Co. v. Green Cove Springs M. R. Co., 139 U. S. 137 (1890), 35 L. Ed. 116;

Marx v. Ebener, 180 U. S. 314 (1900), 45 L. Ed. 547.

In the case of *Galpin v. Page*, *supra*, Mr. Justice Field, in considering the effect of a constructive service of process without meeting the requirements of a statute

providing therefor, took occasion to state clearly the principles underlying the jurisdiction of a Court over the person of a non-resident and upon whom purported constructive service of process has been made. A few excerpts from this learned opinion as the foundation for a decision in this case appears advisable, it being the position of the appellant herein that the purported constructive service of process upon the defendant was void and of no force or effect and the judgment unavailing for any purpose. Among other things he states:

“It is undoubtedly true that a superior court of general jurisdiction proceeding within the general scope of its powers, is presumed to act rightly. All intendment of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments its renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the Court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists the latter will be presumed. This is familiar law, and is asserted by all the adjudged cases. The rule is different with respect to courts of special and limited authority; *as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence of proper averments in the record or their judgments will be deemed void on their face.*”

“The presumptions indulged in support of the judgments of superior courts of general jurisdiction are

also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law.”

“Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, *and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree.* This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length, had it not been impugned and denied by the Circuit Court. *It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in Court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.

“When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory pro-

visions. And such has been the ruling, we believe, of the Courts of every State of the Union."

" 'However high the authority to whom a special statutory power is delegated,' says Mr. Justice Coleridge, of the Queen's Bench, 'we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. The rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions.' *Christie v. Unwin*, 3 Per. & Dav. 208."

"The qualification here made that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment in rem is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. Such is the purport of the language and decision of this court in *Harvey v. Tyler*, 2 Wall. 332, 17 L. Ed. 871. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or *where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.*"

"All presumption of jurisdiction over her person by the District Court, which otherwise might have

been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained. The statute provides, in case of absent and non-resident defendants, for constructive service of process by publication."

"These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence is supplied by proper averment. If there is any different course of decision in the State it could hardly be expected that it would be followed by a Federal court, so as to cut off the right of a citizen of another state from showing that the provisions of law, by which judgment has been obtained against him, have never been pursued.

The provisions mentioned were not strictly pursued with respect to the infant defendants."

"It follows that the decree against her, and all proceedings founded upon such decree, so far as her rights are concerned, necessarily fall to the ground. Judgment without jurisdiction is unavailing for any purpose." (Italics ours.)

In the case of *Settlemier v. Sullivan*, *supra*, a statute of Oregon required service of process to be made by delivering a copy to the defendant personally or, if he could not be found, to some white person of his family above the age of 14 years at his dwelling house or usual place of abode. The copy and notice were not served

on the defendant personally but were served upon his wife by delivering the copies to her "at the usual abode", she being "a white woman over 14 years of age." No statement was made by the officer serving the process that the defendant could not be found nor is any reason given why personal service was not made upon him. In a collateral attack upon the judgment the lower court found the judgment was void for want of jurisdiction, in the court rendering it, over the person of the defendant. On appeal the Supreme Court affirmed the ruling. Mr. Justice Field, in delivering the opinion of the Court, states at 1111:

"The statute of the State in force at the time require service in cases other than those brought against corporations or persons laboring under some disability, as minors or as being of unsound mind, to be made by delivering a copy to the defendant personally; or if he could not be found, to some white person of his family above the age of 14 years, at his dwelling house or usual place of abode. For it to be admitted that substituted service of this kind upon some other member of the family is sufficient to give the Court jurisdiction to render a personal judgment against its head, binding him to the payment of moneys or damages, *it can only be where the condition upon which such service is permissible is shown to exist.* The inability of the officers to find the defendant was not a fact to be inferred but a fact to be affirmatively stated in his return. The substituted service in actions purely in personam was a departure from the rule of the common law and the authority for it, if it could be allowed at all, must have been strictly followed." (Italics ours.)

In the case of *Amy v. The City of Watertown, supra*, the charter of defendant City required service of summons be made on its Mayor. At the time of service of process there was no Mayor in office, he having resigned. The process was served on the last Mayor. The judgment obtained thereon was later set aside on the ground that the summons was not properly served and that consequently the Court had no jurisdiction. This order was affirmed by the Supreme Court. Mr. Justice Bradley, in delivering the opinion of the Court, among other things, stated at 951:

“The question then is reduced to this: Whether in case the Mayor has resigned and there is no presiding officer of the Board of Street Commissioners (a body which seems to take the place of the common counsel of the City for many purposes), service of process on the City Clerk and on a member of the Board is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail there would be no difficulty. In the absence of any head officer the Court could direct service to be made on such official persons as it might deem sufficient. *But when a statute intervenes and displaces the common law, we are brought to a question of words and are bound to take the words of the statute as law.* The cases are numerous which decide that where a particular method of serving process is pointed out by statute that method must be followed and the rule is especially exacting in reference to corporations. (Citing cases.)” (Italics ours.)

In the case of *Marx v. Ebener, supra*, the Court had under consideration the sufficiency of the affidavits filed in support of an order publishing summons against a

non-resident foreign corporation. The affidavits generally stated that the defendant was a foreign corporation, had no officer within the District of Alaska, wherein the proceeding was pending, had no managing agent or other representative and said defendant nor its agents could not be found within the District of said Court. Mr. Justice Peckham, stating the opinion of the Court, found the affidavits sufficient to support the order for service of summons by publication. In considering the sufficiency of showing that must be made to support a constructive service of process he states, at 550:

“Facts must appear from which it will be a just and reasonable inference that the defendant could not, after due diligence be found, and that due diligence has been exercised, * * *.”

(b) A few of the cases from the highest Courts in several of the States and supporting the above rule are:

Brookfield v. Boynton Land & Lumber Co., 192 S. W. 215, (Ark. 1917);

Morris v. Cumberland Production & Refining Co., 218 S. W. 302 (Ky. 1920);

Dent v. Investors' Security Assn., 254 S. W. 1080 (Mo. 1923);

Brooks v. Nevada Nickel Syndicate, 53 Pac. 597 (Nev. 1898);

Venner v. Denver Union Water Co., 63 Pac. 1061 (Colo. 1900);

Seacoast Lumber Co. v. R. J. & B. F. Camp Lbr. Co., 59 So. 13 (Fla. 1912);

Morton v. Davezar, 20 Ohio App. 427;

Gursky v. Blair, 218 N. Y. 41 (1916).

In *Brookfield v. Boynton Land & Lumber Co.*, *supra*, the foreign corporation had complied with the State law by designating an agent within the State upon who summons could be served. The summons, however, was served upon the Secretary of State as the agent of defendant. Judgment against defendant was rendered upon this service. The Supreme Court says the proceedings were invalid because the service should have been made upon the designated agent or upon some employee at its place of business. No showing was made that neither said agent nor employee could not be found and the service of process upon the Secretary of State therefore justified.

In *Morris v. Cumberland Production & Refining Co.*, *supra*, the service of summons was made upon the Secretary-Treasurer and plant manager of defendant foreign corporation in the County wherein the suit was filed. The President of defendant resided in the State but in a different County. The Civil Code of Kentucky provided that summons against a corporation could be served in any County upon the defendant's chief officer or could be served in the County wherein the action was brought upon the defendant's chief officer or agent who could be found therein. Because the Secretary-Treasurer, or plant managing agent was considered an officer of lesser rank than the President service upon the Secretary-Treasurer and plant managing agent, in the absence of a showing that no superior officer could be found was held to be insufficient. The Court states at 304:

"It appears from the record without dispute that this corporation, at the time the suit was brought

and the summons served at its chief office in Lexington, Kentucky; that its President resided in Clarke County; and that Foster, who was described in the officer's return, as a person having charge of the company's works in Estill County, was in fact its Secretary and Treasurer. It does not appear that the company had any other chief officers in the State at that time. Therefore the summons in this case should have been executed on the President of the corporation, and it follows from this that the service on Foster, although he was in fact Secretary-Treasurer, was not sufficient to authorize judgment by default."

In *Brooks v. Nevada Nickel Syndicate*, *supra*, defendant, Illinois corporation, was sued in the State Court of Nevada. The Sheriff delivered a copy of the summons and complaint to the Secretary of State of the State of Nevada, the defendant having no agent in the State upon whom service could be made or could be found in the County in which suit was pending. The Nevada statute required a foreign corporation doing business or owning property within the State should appoint and keep in the State an agent upon whom legal process could be served and in case of their failure to comply with those requirements then service of process could be made upon the Secretary of State. The records in the case made no showing that defendant had not appointed an agent on whom service could be made or that it had not kept such agent within the State. Because service on the Secretary of State was conditioned upon the non-existence of these two facts the Supreme Court of Nevada re-

versed the case, the Court, among other things, stating at 600:

“The statute does not require that the Appellant shall appoint or keep the agent in any particular County *and before the Court could acquire jurisdiction over the Appellant by the attempting of service the records should show that the Appellant had not appointed any agent upon whom service could be made as required by the Act and that it had not kept such agent within the State.* Suggestions have been made by counsel as to the manner in which the showing of these facts shall be made. The statute fails to prescribe any method of procedure, and in the absence of any prescribed method we can only suggest that all jurisdictional facts under this statute should be made to appear in the Judgment Roll.” (Italics ours.)

In *Venner v. Denver Union Water Co.*, *supra*, service of summons was attempted upon defendant foreign corporation by serving the Vice-President of the Company. The statutes of Colorado require a foreign corporation doing business therein to file its certificate and to designate an authorized agent upon whom process could be served. They also provide that in an action against a foreign corporation doing business in the State the summons should be served by delivering a copy to any agent of the corporation found in the County in which the action was brought and if no agent could be found in such County then by delivering a copy of the summons to any stockholder who may be found in the County.

The return of service showed the service to have been made upon Venner, as Vice-President, and not as a stockholder and the return did not show that no agent of the corporation could be found in the County wherein the suit was brought. The Court held that the service as made was invalid, that said foreign corporation was not within the jurisdiction of the Court and the judgment against it a nullity. In a very clear and logical opinion the Court says, at 1064:

“Service of summons could therefore be made upon it only by the delivery of a copy of the writ to an agent of the corporation found in the County of the suit, or to a stockholder in that County, if such agent could not be found. In this case, as shown by the return, the service was made upon Venner not as a stockholder but as a Vice-President and the return did not show that no agent of the corporation could be found in Arapahoe County. It is only in the event that no agent is found in the County that service may be had upon a stockholder. But under no condition would service upon the Vice-President of a foreign corporation satisfy the requirements of the statute. Mr. Venner may or may not have been a stockholder. There is nothing in the record to indicate whether he was or not, but service upon him as Vice-President was not service upon him as a stockholder so that if the return were otherwise sufficient it would not show valid service. But if the service had been upon Venner as a stockholder the Court would still have had no jurisdiction of the American Water Works Co.

There could be no service upon a stockholder except upon a failure to find an agent in the County * * *. *Where substituted service is authorized it is sufficient to give the Court jurisdiction only where the condition upon which it is permissible exists; and the existence of the condition is not to be inferred but must appear by affirmative statement in the return.* (Citing cases.) In a suit against a foreign corporation service must be made upon it by delivering a copy of the summons to its agent found within the County where the action is brought and it is only in case such agent is not found within the County that substituted service is valid. Service upon a stockholder, unless there is a failure to find the agent, is a nullity. *The return of service is not aided by presumption.* And to give the Court jurisdiction where service is had upon a stockholder the return must show that no agent of the corporation could be found within the County.” (Italics ours.)

In *Gursky v. Blair, supra*, the Court states at 146:

“The Code contemplates that before service is made on a managing agent of a foreign corporation diligent effort should be made to serve the officers of the corporation or its agent designated under the general corporation law. Service upon the managing agent can be resorted to only after efforts to reach the corporation more directly have failed * * *. The papers should show that the plaintiff could not, in the exercise of due diligence, make service on the Receiver within this State.”

5. **Proper Service of Process Is Absolutely Necessary in Order for a Court to Acquire Jurisdiction or to Proceed Against a Person Named as Party Defendant.**

50 *Cor. Jur.* p. 446, Sec. 17;

15 *Cor. Jur.* p. 798, Sec. 96;

21 *R. C. L.*, p. 1262, also p. 1348.

In 15 *Cor. Jur.* p. 798, Sec. 96, the rule is stated as follows:

“There must be some service on the defendant in some mode authorized by law or the court cannot proceed, and a judgment rendered without such service is a nullity. So the rule prevails that service of process or the prescribed legal or statutory notice is always a prerequisite to jurisdiction over either the person or the property, and the statutory mode of service or of giving notice must be followed, including requirements as to time. Conversely, where a defendant has properly been served with process, the court has jurisdiction of his person. A person’s knowledge of the existence of an action, no matter how clearly brought home to him, does not supply the want of compliance with the statutory or legal requirements as to service, nor does a person’s mere presence in court give jurisdiction to enter a judgment against him when he was not brought there by any legal means.”

6. **When the State Court Lacks Jurisdiction of the Subject Matter or of the Parties the Federal Court Acquires None for the Federal Court to Which the Cause Is Removed Takes It as It Stood in the State Court.**

Venner v. Michigan C. R. Co., 271 U. S. 127; 70 L. Ed. 868;

General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261; 67 L. Ed. 244;

Lambert R. Coal Co. v. Baltimore & Ohio R. Co., 258 U. S. 377; 66 L. Ed. 671;

Cain v. Commercial Pub. Co., 232 U. S. 124; 58 L. Ed. 534;

De Lima v. Bidwell, 182 U. S. 174; 45 L. Ed. 1041.

In *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, *supra*, Mr. Justice Brandeis states at 675:

“As the State Court was without jurisdiction over either the subject matter or the parties the U. S. District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the Federal Court on removal is, in a limited sense, a derivative jurisdiction. *If the State Court lacks jurisdiction of the subject matter or of the parties the Federal Court acquires none*, although it may in a like suit originally brought here have had jurisdiction. (Citing cases.)” (Italics ours.)

In *General Investment Co. v. Lake Shore & M. S. R. Co.*, *supra*, Mr. Justice Van DeVanter states at 260:

“When a cause is removed from a State Court into a Federal Court the latter takes it as it stood in the former. And want of jurisdiction in the State Court is not cured by the removal but may be asserted after it is consummated. (Citing cases.)”

7. Jurisdiction Over the Parties Must Affirmatively Appear in Record Proper and Not in Bill of Exceptions and the Question as to Its Existence May Be Raised at Any Time.

New Orleans, O. & G. W. R. Co. v. Morgan,
10 Wall 256 (1869); 19 L. Ed. 892;

Continental Life Ins. Co. v. Rhoads, 119 U. S. 237
(1886); 30 L. Ed. 380;

*Board of County Commissioners of the City and
County of Denver v. Home Savings Bank*, 236
U. S. 101 (1914); 59 L. Ed. 485;

*City of Gainesville v. Brown-Cummer Investment
Co.*, 277 U. S. 54 (1927); 72 L. Ed. 781.

In *City of Gainesville v. Brown, etc., supra*, Mr. Justice Taft stated at 73:

“Of course a question of jurisdiction could not be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time. (Citing cases.)”

In *New Orleans, etc. v. Morgan, supra*, the Court stated at 892:

“Certain errors in judicial proceeding can only be examined in an Appellate Court where they are shown by a Bill of Exceptions,—as where proper testimony is rejected or where improper testimony is admitted—but there may be error in the proceedings of a subordinate Court apparent in the record for which the judgment will be reversed in a tribunal although they are not shown by a Bill of Exceptions and do not appear in a statement of facts, or by demurrer, or in a special verdict—as where the original process was unauthorized by law, or *where the defendant was not served with process, or*

where the proceedings under the process were irregular and void. Such were the rules of the common law and they have been adopted and applied in this Court in repeated cases. (Citing cases.)” (Italics ours.)

In *Board of County Commissioners, etc. v. Home Savings Bank*, *supra*, Mr. Justice Holmes states at 487:

“The Circuit Court of Appeals declined to consider the correctness of this ruling (a demurrer to third defense which set up failure of consideration) because no exception was taken to it. But no exception or Bill of Exception is necessary to open a question of law already apparent on the record and there is nothing in the record that indicates a waiver of the defendants’ rights.”

8. **A Petition for Removal Does Not Amount to a General Appearance But Is a Special Appearance Only and After Removal Party Invoking It Has the Right to a Decision of the United States Court on the Validity of the Service of Process.**

Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405 (1928); 73 L. Ed. 762;

General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261; 67 L. Ed. 244;

Lee v. Chesapeake & O. R. Co., 260 U. S. 652; 67 L. Ed. 433;

Hassler v. Shaw, 271 U. S. 195; 70 L. Ed. 900;

Cain v. Commercial Pub. Co., 232 U. S. 124; 58 L. Ed. 534;

Mechanical Appliance Co. v. Castleman, 215 U. S. 437; 54 L. Ed. 272;

Wabash Central R. Co. v. Brown, 164 U. S. 271; 41 L. Ed. 431.

In *General Investment Co. v. Lake Shore, etc., supra*, Mr. Justice Van Devanter states at 252:

“Besides it is still settled that a petition for removal, even if not containing such a reservation, does not amount to a general appearance but only a special appearance and that after the removal the parties seeking it has the same right to invoke the decision of the U. S. Court on the validity of the prior service that it has to ask its judgment on the merits. (Citing cases.)”

9. Where Want of Jurisdiction Appears the Circuit Court of Appeals, in Remanding the Cause to the District Court Should Direct a Dismissal for Want of Jurisdiction.

Lambert, etc., v. Baltimore, etc., 258 U. S. 377;
66 L. Ed. 671, at 676.

In view of the fact that service of process upon defendant foreign corporation was attempted by plaintiff by forwarding duplicate copies of complaint and summons to the Secretary of State of the State of California and that the records in this cause, both as they appear in the State Court at the time they were transferred to the Federal Court and as they appear in the latter, totally fail to show the non-existence of the facts required by Section 406a of the Civil Code of the State of California and upon which showing service of process upon the Secretary of State of the State of California is conditioned, Appellant respectfully urges and insists that the purported and pretended service of process was abortive and invalid for

any purpose, that the State Court acquired no jurisdiction over the defendant, that consequently the Federal Court never acquired any jurisdiction over defendant, that the proceedings in their entirety are a nullity, that the judgment is absolutely void and that this Honorable Court in remanding the case to the District Court should direct it to enter a dismissal.

In the research of counsel for Appellant no case contrary to the rules above prescribed has been found. The very foundation upon which a judicial decree rests, i. e., the proper and valid service of process upon a defendant, is involved in this point. As will be noticed from the decisions cited substituted service has received the profound consideration of the highest courts in our land and though approved, is valid only when every statutory requirement has been met. All proceedings with respect to the service of the process in this case are before this Court. The question of jurisdiction over defendant is before this Court irrespective of any ruling which may be made upon the objections of plaintiff to the settlement of the Bill of Exceptions, because such jurisdiction must appear in the record proper and is not a part of the Bill of Exceptions. Although the burden rests affirmatively upon the party contending that jurisdiction exists, to affirmatively show in the record such jurisdiction, the Appellant who at all times has contested and protested against the pretended service of process in this case, has not only met every argument of the plaintiff on this question but submits it has affirmatively and conclusively shown the impropriety and invalidity of the purported service of process in this case.

II.

NEITHER THE SUPERIOR COURT OF THE STATE OF CALIFORNIA NOR THE UNITED STATES DISTRICT COURT EVER HAD NOR NOW HAS JURISDICTION OVER DEFENDANT BECAUSE IT IS A FOREIGN CORPORATION ENGAGED ONLY IN INTERSTATE COMMERCE AND NOT "DOING BUSINESS" IN CALIFORNIA.

The above point is one of law to determine from the facts as properly before the Court and the application of the proper principles of law thereto. Be it remembered that the first thing defendant did in this case after removal to the District Court was to file its Motion to Quash service of process on the ground, among others, that defendant was not doing business in the State of California [Tr. 52-53]. This was supported by three affidavits of Robert V. Jordan, Assistant Secretary of State of the State of California [Tr. 54], the Executive Vice-President of defendant [Tr. 55] and the Secretary and General Manager thereof [Tr. 58]; the latter two being in Buffalo, New York. Plaintiff filed in opposition two affidavits, one by herself [Tr. 61] and one by her son, her attorney [Tr. 62]. The Court, on these affidavits, granted the Motion to Quash [Tr. 66], but later set the order aside upon request of plaintiff [Tr. 66]. While the question was thus re-submitted plaintiff obtained an order re-opening the proceedings to take the oral evidence of Miss E. Kaster, Mr. W. E. Max and Mr. E. C. Mack [Tr. 68]. At the hearing to take the evidence of these three parties, the only witness of the three named in the order whose evidence was taken was Miss E. Kaster. Over the defendant's strenuous objection and exceptions,

however, Robert H. Breckenridge [Tr. 69], Carl S. Nance [Tr. 72] and Mrs. Lena G. Smuckler, Plaintiff [Tr. 76] were all permitted to testify. Defendant filed two counter-affidavits; one of its Secretary and General Manager [Tr. 82] and the other of its Executive Vice-President and in charge of sales [Tr. 84]. The Court then made his order as follows [Tr. 87]:

“The oral evidence taken is sufficient, being uncontradicted, to show that the defendant was doing business in California.”

“Motion to Quash is denied with right to defendant to renew the same at the trial. Exception to defendant.”

At the trial the motion was renewed by defendant [Tr. 88]. The affidavits theretofore filed by it were relied upon [Tr. 90] as well as those of five employees of the public warehouse in San Francisco to which defendant occasionally shipped bulk lots of its merchandise for re-shipment to its customers, for the sake of convenience and economy, these employees being John Brash, Superintendent [Tr. 92-100], George Savage, Alternate Office Manager [Tr. 101-104], J. W. Howell, Secretary [Tr. 105-106], W. G. Heise, Office Manager [Tr. 107-115] and Edwin C. Lloyd, former employee [Tr. 116-117]. Further affidavit of the Vice-President of defendant, in charge of sales and shipments, was filed [Tr. 118-124]. No counter-affidavits or any further evidence was offered by plaintiff [Tr. 125]. The Court then denied the Motion to Quash [Tr. 125], and exception was taken by de-

fendant, and the case went to trial [Tr. 125]. At no time prior to the entry of the judgment based upon the verdict of the jury did the plaintiff file any further affidavits or present any additional evidence in support of the jurisdiction of the Court [Tr. 125]. After preliminary motions of defendant directed to the sufficiency of the complaint were denied [Tr. 127-28] the jury was impanelled and the first witness sworn. At that time, and at the suggestion of the Court, and over the objection and exception of defendant, plaintiff was permitted to amend, by interlineation, Paragraph II of her complaint so as to allege for the first time that defendant "was doing business within the State of California" [Tr. 130]. Paragraph II of the complaint, during all of the times that defendant's Motions to Quash were urged and were ruled upon, did not allege that the defendant was doing business in the State of California, but only [Tr. 3 P. II]

"That at all times herein mentioned LIQUID VENEER CORPORATION was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York."

Appellant submits that the District Court erred in overruling these Motions to Quash. The question must be reviewed by considering the stage of the evidence when (1) the Court first denied the Motion [Tr. 87], or (2) the Motion was renewed and denied at the time of trial [Tr. 125]. Appellant urges the Court erred in each instance. The only witness whose testimony was properly before the Court at the re-opened hearing was that

of Miss E. Kaster, she being the only witness of the three named in the order permitting the taking of oral evidence [Tr. 68] who testified and her testimony amounted only to the fact that she was a demonstrator paid by defendant who demonstrated defendant's products which were purchased from it by and sold by the May Company at Los Angeles, as well as other merchandise of the latter Company [Tr. 74-75]. Assuming without admitting that the evidence of the other witnesses was properly before the Court, Mr. Breckenridge and Mr. Nance only identified certain invoices of the defendant some of which bore the notation that the merchandise would be "shipped from warehouse at San Francisco," and certain freight bills [Tr. 69-74] and all of which procedure was fully explained by the affidavits of the Secretary and General Manager [Tr. 82] and Vice-President in charge of sales [Tr. 84]. The evidence of Mrs. Lena G. Smuckler consisted only of legal conclusions and of hearsay evidence to which the most forceful objections were made and Motions to Strike were urged [Tr. 76-82], and the admissibility of which evidence constitutes two of the Assignments of Error in this appeal [A. E. 5 and 6; Tr. 262-3].

The conclusion of the court that the evidence was uncontradicted and was sufficient to show that the defendant was doing business in the State of California is unsupported by the record. However, since the Court made its final order denying Motion to Quash after additional affidavits were before him, we will present the situation as it existed at the time such final order was made.

1. **Neither the Complaint Nor Any Affidavit, Nor Other Statement at the Time of the Rulings Upon the Motions to Quash, and Their Denial, Set Forth or Alleged the Requisite Jurisdictional Fact That the Defendant Was Doing Business in the State of California.**

As stressed in Point One of this Brief, jurisdictional facts must affirmatively appear in the record. These facts must be present when the jurisdictional question is before the Court for consideration. By Section 411 of the California Code of Civil Procedure, *supra*, summons against a foreign corporation "doing business in this State" must be served in the manner provided by Section 406a of the Civil Code. By Section 407 of the Civil Code, *supra*, the requirements of the Chapter of the Code in which is included Section 406a do "not apply to corporations engaged solely in interstate or foreign commerce." No presumption of law exists in favor of the jurisdiction of a Court over a foreign corporation where service is effected in a constructive manner. The jurisdictional facts must affirmatively appear by proper averments in the record. (*Galpin v. Page, supra.*) An allegation, therefore, that the defendant was doing business in the State of California was indispensable to a valid service of process upon the Secretary of State of the State of California. Since no such allegation was present at the time when the jurisdictional question was before the Court it is submitted the Court erred in denying the Motions to Quash, that the Court was without jurisdiction and that the judgment herein is absolutely void.

2. The Facts Clearly Show Defendant Was Not Doing Business in the State of California.

Taking the evidence before the Court as it was when the Motion to Quash was finally urged just prior to actual trial and denied [Tr. 125], the only conflict that existed was between that of Mrs. Smuckler, the plaintiff, and the officers and employees of the public warehouse in San Francisco. Her affidavit [Tr. 61] and that of her son [Tr. 62] state only conclusions and have no probative value. Her oral testimony [Tr. 76-81] is to the effect that in the early part of 1932 she went to a warehouse in San Francisco and saw merchandise labeled "Liquid Veneer" and bills being made out to customers to whom shipments were being made [Tr. 76] and that the "bookkeeper" told her (over defendant's strenuous objection that such conversation was "immaterial, incompetent and purely hearsay") [Tr. 76], Liquid Veneer was kept there and customers could come there, purchase and have Liquid Veneer shipped to them, that agents took orders and shipped from the warehouse and that she could purchase Liquid Veneer there and have it shipped to her address. On further examination by the Court and counsel for defendant she testified [Tr. 78] she was in the warehouse about one hour, that the room in which she saw the Liquid Veneer was about one-half the size of the Court room in which she was testifying and the door to which room was right next to a wicket behind which the bookkeeper was working; that this occurred in 1930 or 1931 [Tr. 81] and though she was gathering information with regards to this case she neither asked his name [Tr. 80] nor could she describe him [Tr. 80]. This action was filed Dec. 17, 1931 [Tr. 9].

Appellant submits the Court erred in admitting the evidence of this alleged conversation with said bookkeeper over defendant's objection [Tr. 76; A. E. 6; Tr. 263] and in refusing to strike that evidence upon the ground that it was hearsay [Tr. 78; A. E. 6; Tr. 263], and that such evidence should be totally disregarded. In addition there is the point that the agency of a person can not be established by the declarations of that agent. The officers of the warehouse deny such conversation took place or any employee was ever authorized to make any such statements and the officers of defendant corporation deny that any person was authorized to so represent. The only effect then of her evidence is that Liquid Veneer was in a room the entrance to which was at the right of a wicket. In this she is conclusively rebutted as such Liquid Veneer as was there was always kept in the basement of the warehouse and which could only be entered by going the full length "of the building on Brannon Street, around the end of the railroad tracks extending into the building, thence back the length of the building to a basement stairs, and then down to the basement floor." [Tr. 98; 103; 112.] The only times when a quantity which would half fill a Court Room [Tr. 100] or a freight car [Tr. 115] would be upon the immediate unloading of a bulk shipment [Tr. 100; 115]. Even assuming the conversation with the bookkeeper admissible it is conclusively rebutted by the evidence of the officers and employees of the warehouse. They say only one man, W. G. Heise, was on the clerical force of the warehouse [Tr. 98, 99] and in event of his illness or absence his place was taken by George Savage. Both of these parties state that at no time did either have any conversation with the plaintiff [Tr. 103; 112]. That it

is highly improbable that such conversation ever took place is also shown by the evidence that the warehouse business is confidential and neither the names of the patrons thereof nor extent of their holdings is disclosed [Tr. 99; 103; 106; 114]. That plaintiff would be permitted under these circumstances to wander about this public warehouse for approximately one hour is inconceivable.

Appellant submits plaintiff utterly failed to show defendant was doing business in California. Her testimony has been completely discredited and the fact that defendant did ship its products in bulk shipments to a public warehouse for re-shipment to its customers does not constitute "doing business" as decisions hereafter referred to will show. The invoices upon which plaintiff apparently relies all show the office of defendant to be in Buffalo, New York; they name the carrier such as the "Wabash c/o S. Fe" [Tr. 69], "Pac. S. S. Co." [Tr. 70], and give terms of sale. Plaintiff apparently contends that the notations thereon of "Ship from warehouse at San Francisco, Calif." [Ex. 2; Tr. 70], "Balance of order shipped from warehouse" [Ex. 4; Tr. 70], "Ship from our warehouse at San Francisco, Calif." [Ex. 7, Tr. 70], prove the doing of business in California. If the warehouse in San Francisco were by plaintiff shown to be owned or operated by the plaintiff or that it had employees therein, some such contention might possibly be made. However, the facts that all invoices show the only office of defendant to be in Buffalo, New York, that shipments were routed over transcontinental railroad connections or by steamship lines, that all invoices were sent from the office in Buffalo, New York, taken with the

fact that the warehouse in question is a public warehouse which merely reships bulk shipments, completely dispel and rebut any inferences that might arise from said invoices that defendant was doing business in California.

The evidence as to defendant's method of operation shows: Defendant is engaged in the manufacture and sale of household and automotive specialties. Its principal product is a furniture polish called "Liquid Veneer." Its office, factory and place of business are in Buffalo, New York [Tr. 55; 58; 59]. Its business is essentially mail order business [Tr. 57; 60; 118]. Orders are received at its office in Buffalo, New York, through the mails or by telegram direct from its customers [Tr. 56]. E. C. Mack, referred to in the letter from plaintiff's counsel addressed to the Secretary of State as defendant's Pacific Coast representative [Tr. 224] is neither officer nor agent of defendant but a traveling salesman having no connection with the Company other than the solicitation of orders on a commission basis. He travels in California, Washington, Oregon, Nevada, Montana and Idaho [Tr. 56; 63; 65]. No sales of defendant's goods are made by him. He solicits orders which are by him transmitted to defendant at Buffalo, New York, for acceptance [Tr. 63; 65]. Upon receipt and acceptance of orders from said E. C. Mack and directly from its customers [Tr. 85] defendant fills them by shipping the goods so ordered from its factory in Buffalo, New York, either directly to the person giving the order, with Bill of Lading attached, [Tr. 65; 85; 119] or to a public warehouse to be delivered to the person placing such order [Tr. 65; 85; 119]. Shipments to the public warehouse and the reshipment to the customers occur in this manner: The

freight on merchandise shipped overland across the United States in less than carload lots is \$3.45 per 100#; if sent from Buffalo, New York, by rail to New York City and by boat to San Francisco, the combined freight rate by rail and water is \$1.15 per 100#, resulting in a saving of \$2.30 per 100# [Tr. 82-83]. It is a common practice in interstate commerce [Tr. 83] to therefore ship merchandise on long hauls in carload lots or by rail and boat, and route the merchandise to a central point such as a public warehouse in San Francisco for re-distribution to customers, having the shipment there broken up and re-distributed [Tr. 83; 86]; that is the only practical method to insure both economy and service. All orders whether received direct from purchaser or traveling salesman were first to be approved in Buffalo, New York, [Tr. 85; 119]. Some orders were filled in Buffalo and sent direct to the customers [Tr. 119]; at other times when it appeared from the number of orders coming into Buffalo from California, Washington, Oregon and adjacent States, that a bulk shipment could be made to a central point, San Francisco, for economy, and there re-distributed to the persons placing the orders, such orders would be accumulated until, taking into account the time required for a carload or other bulk shipment to reach San Francisco, it was estimated that the orders accumulated by the time of arrival would equal the contents of such bulk shipment [Tr. 121] thereupon such bulk shipment would be made to the public warehouse in San Francisco. In due course the office in Buffalo would forward to the warehouse separate instructions to re-ship to the customers whose orders were to be filled the specific kinds and quantities of the merchandise so ordered [Tr. 121]. These directions arrived in San Francisco at or about the

time of the arrival of the shipment. [Tr. 122.] It was the purpose and aim of the defendant not to accumulate any surplus goods in California. [Tr. 122.] If the goods shipped exceeded the orders additional instructions were forwarded; if there were a deficiency of goods they would either be sent direct to the customer or be shipped from the next bulk shipment [Tr. 122]. On occasions because of cancellation of orders or revoking acceptance of an approval, after the bulk shipment had been re-distributed, there would be a small surplus of goods in the warehouse but this would be shipped out in a short time. [Tr. 122]. Except for immediately upon receipt of a bulk shipment and before re-shipping process was completed there was never any large amount of the defendant's goods in the warehouse in San Francisco. [Tr. 122; 124]. No permanent stock of goods in any warehouse in California was ever carried by defendant. [Tr. 85]. No initial shipment of defendant's goods was ever made from any point except from the City of Buffalo, New York. [Tr. 86.] All billing was done from Buffalo [Tr. 57; 60; 70; 124]. All invoices were collected for and paid for at Buffalo, New York. [Tr. 57; 60.] All credits and charges were made at Buffalo, New York. [Tr. 57; 60.] The defendant had no representative or employee in any warehouse [Tr. 85], nor at any time has any person in any warehouse, or elsewhere in the State of California, been employed or authorized by defendant, directly or indirectly, to sell goods on its behalf or to extend credits or has it had authority to sell goods or to speak for or on behalf of the defendant with reference to its method of doing business or to have in his possession prepared bills or invoices of goods of defendant [Tr. 123]. Defendant's only employees were a demonstrator and a

traveling salesman who solicited orders strictly on a commission basis [Tr. 86]. The demonstrator was at the May Company in Los Angeles and though paid by defendant she demonstrated not only Liquid Veneer but other merchandise sold by the May Company. There were about twenty such demonstrators showing various products in that store [Tr. 74-75]. Neither the warehouse company nor its employees were ever furnished with prices of defendant's products and did not know the prices at which such goods were or should be sold [Tr. 96; 111; 124]. No bills or invoices went into the hands of any warehouse or its employees and neither had anything to do with the billing or invoicing of the goods of defendant [Tr. 96; 111; 124]. This was always done from the office in Buffalo, New York. [Tr. 124.] Defendant has not at any time maintained an office or place of business in the State of California [Tr. 56]. Upon receipt at the warehouse the goods were unloaded and segregated from all other goods and put into the basement [Tr. 109; 195]. Instructions from New York would be received either preceding, concurrently with, or shortly following the receipt of said goods [Tr. 109] to break up such bulk shipment and re-ship to various customers in California and adjacent States [Tr. 95; 109]. Its only duty was to break up the bulk shipment and re-ship to the designated parties [Tr. 96]. The only papers prepared by it were the ordinary shipping bills or Bills of Lading [Tr. 96; 110]. It had no permission to sell any of said goods [Tr. 96; 111], nor did it seek to sell the same or to quote, nor did it know any prices [Tr. 96; 111]. It acted only as a warehouseman and was compensated upon basis of space taken up by the goods while in the warehouse, according to the time while there

and the amount of labor involved in handling, etc. [Tr. 111.]

Upon these facts defendant contends that outside of the State of New York the defendant does a strictly interstate commerce business. As a general business policy it has no branches, agents, stock of goods or property except in the State of New York [Tr. 87]. The only business done by it in the State of California is the shipment of its products into that state in interstate commerce and the necessary details in connection therewith [Tr. 57; 60]. The defendant was therefore not doing business in the State of California. Neither the State Court nor the District Court ever had jurisdiction over the person of the defendant and all proceedings in this case are a nullity and the judgment is void.

3. The Law, When Applied to Above Facts, Clearly Declares Defendant Not Doing Business in the State of California.

(A) The Supreme Court of the United States has declared the following criteria for determining the question of what constitutes the “doing of business” by a foreign corporation so that a State or Federal Court, other than in the State of its incorporation, may obtain jurisdiction over it.

In *Greene v. Chicago Burlington & Quincy R. R. Co.*, 205 U. S. 530; 51 L. Ed. 916, a citizen of Pennsylvania brought an action in the Federal Court in that State against defendant, an Iowa Corporation, for injuries sustained in Colorado. Service of process was made by serving an agent of defendant in Pennsylvania and defendant moved to vacate the service. The defendant had

employed this agent, had "hired an office for him in Pennsylvania, designated him as district freight and passenger agent, and in many ways advertised to the public these facts. The business of the agent was to solicit and procure passengers and freight to be transported over the defendant's line. For conducting this business several clerks and various traveling passenger and freight agents were employed who reported to the agent and acted under his direction." The Court held that the above was not "doing business" within the District so that process could be served upon it. The Court (by Mr. Justice Moody) stated:

"But to obtain jurisdiction there must be service, and the service was upon the corporation in the Eastern District of Pennsylvania. Its validity depends upon whether the corporation was doing business in that District in such a manner and to such an extent as to warrant the inference that through its agents it was present and there."

"It is obvious that the defendant was doing there a considerable business of a certain kind although there was no carriage of freight or passengers. . . . *The business shown in this case was in substance nothing more than that of solicitation.* Without undertaking to formulate any general rule, defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, *we think that this is not enough to bring the defendant within the District so that process can be served upon it.* (Italics ours.)

In *International Harvester of America v. Commonwealth of Kentucky*, 234 U. S. 572; 58 L. Ed. 1479, an indictment had been returned against defendant for al-

leged violation of the Anti-Trust Laws of the State of Kentucky and service of process had been made in that State upon one of its agents. The question involved was whether there was such service of process as would sustain the judgment by default taken against defendant. The agents of defendant in the State of Kentucky, in addition to soliciting orders, were authorized "to receive payment in money, check or draft, and to take notes payable at banks in Kentucky." The Court stated: "*Upon this question the case is a close one,*" but held the above sufficient doing of business to sustain the service. The Court (by Mr. Justice Day) further stated:

"For some purposes a corporation is deemed to be a resident of the State of its creation; *but when a corporation of one State goes into another, in order to be regarded as within the latter it must be there, by its agents, authorized to transact its business in that State. . . .* It has been frequently held by this Court, and it can no longer be doubted, that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the State. . . . Each case must depend upon its own facts, and every consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is *actually doing business within the State.*" (Italics ours.)

The fact that the agents were authorized to receive payment in money, checks, or draft, for the merchandise listed, and to take notes payable at the banks in Kentucky, was the element that persuaded the Court to hold as it did and even then stated, that the case was a close one.

In *Philadelphia and Reading Railway Co. v. McKibbin*, 234 U. S. 264; 61 L. Ed. 710, the defendant, a Pennsylvania corporation, was sued in the Federal Court in New York for personal injuries sustained by plaintiff, a citizen of New York, and in one of defendant's freight yards in New Jersey. Service of summons was made on defendant's President in New York. The Motion to set aside the service was denied by the Lower Courts. Verdict was rendered for the plaintiff and defendant took this appeal. Freight cars of defendant came into the State of New York over connecting carriers and in course of time were returned, defendant receiving its portion of the through freight payable for the haul over its own line. Its signs were displayed at a ferry terminal and its name appeared in the telephone directory. The Court held that this did not constitute "doing business" and ordered that "the judgment of the District Court is reversed and the cause remanded to that Court with directions to dismiss it for want of jurisdiction." The Court (by Mr. Justice Brandeis) states:

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference *that it is present there*. And even if it is doing business within the state the process *will be valid only, if served upon some authorized agent*. . . . Whether the corporation was doing business within the State and whether the person served was an authorized agent, *are questions vital to the jurisdiction of the Court*. A decision of the lower court on either question, if duly challenged,

is the subject to review in this Court; and the review extends to findings of fact as well as to conclusions of law.” (Italics ours.)

In *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587, plaintiff brought suit in the U. S. District Court of Louisiana, to recover damages under the Sherman Act. Service of process was made on Irby as manager of the Company, and later upon the Secretary of State of Louisiana. Defendant's exceptions to service of process were sustained by the lower court and affirmed on appeal. Defendant solicited orders through agents, advertised its products, and owned stock in corporations carrying on business in the State of Louisiana. This was held not to be sufficient to constitute “doing business in Louisiana.” The Court (by Mr. Justice Day) states with respect to the question as to what constituted the doing of business in such wise as to make the corporation subject to service of process:

“The general rule deducible from ALL our decisions, is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the legal jurisdiction, *and is, by its duly authorized officers or agents, present within the State or District where service is attempted.* . . . As to the continued practice of advertising its wares in Louisiana and sending its soliciting agents into that state, the agents having no authority beyond solicitation, we think the previous decisions of this Court have settled the law to be that such practices did not amount to that of doing business which subjects the corporation to the legal jurisdiction for the process of service upon it.” (Italics ours.)

The case of *Bank of America v. Whitney Central National Bank*, 261 U. S. 171, 67 L. Ed. 594, presents a situation which is exactly analogous to the case at bar except that therein the commodity handled was money instead of furniture polish. The defendant had its banking house and place of business in New Orleans, Louisiana. The plaintiff sued it in a District Court in New York. Process was served upon the President while temporarily in New York. Defendant appeared specially, challenged the jurisdiction of the Court and moved that the service be set aside. The sole question for determination was whether at the time of service of process defendant was doing business within the district in New York as to warrant the inference that it was present there. Defendant carried continuously active regular deposit accounts with six banks located in New York. Payment was made in New York of drafts drawn, with accompanying documents, against Letters of Credit issued by defendant at New Orleans; receipt was given in New York from brokers and others of securities in which the defendant or its depositors were interested and deliveries of such securities were received; payments for these securities to persons in New York were made; securities were held on deposit in New York for long periods and arrangements were made for the substitution of these securities; checks drawn on defendant by third parties, with whom it had no banking or deposit relations, were cashed under specific instructions from the defendant and deposits of moneys in New York from third parties with whom defendant had apparently no banking relations and for the accounts of its customers, were received. The analogy in the said case with that of the case now before the Court lies in that the defendant in this suit had on deposit, so to speak, in a public warehouse

in San Francisco certain quantities of its merchandise which was to be delivered to certain of its customers upon its instructions, the same as the money on deposit was to be paid over and delivered to the payees of drafts, checks and holders of Letters of Credit. In the cited case even greater functions were performed by the depository banks than were performed in this case by the public warehouse in San Francisco, in that these banks received for the benefit and account of the defendant and its depositors, securities, deposits, etc., while in our case the public warehouse only received merchandise from the defendant and distributed the same upon the defendant's order. The fact that in one instance money was involved and the other furniture polish should make no difference in applying the reasoning of and the principles of law enunciated by the Court. Mr. Justice Brandeis, in holding that the defendant was not doing business in the State of New York and that the Court did not therefore have jurisdiction over it, stated as follows:

“The Whitney Central had what would popularly be called a large New York business. The transactions were varied, important and extensive. But it had no place of business in New York. None of its officers or employees was resident there. Nor was this New York business attended to by any one of its officers or employees resident elsewhere. Its regular New York business was transacted for it by its correspondents,—the six independent New York banks. They, not the Whitney Central, were doing its business in New York. In this respect their relationship is comparable to that of a factor acting for an absent principal. The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a

fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the State or district in such a manner and to such an extent that its actual presence there is established. That the defendant was not in New York, and, hence, was not found within the district, is clear.” (Italics ours.)

(B) Other Federal Courts have set forth the following criteria:

In *Doe v. Springfield Boiler & Mfg. Co.*, 104 Fed. 684, Circuit Court of Appeals for this the 9th Circuit, service of monition in a suit in Admiralty, upon a commission procured in San Francisco, as agent of defendant, was held invalid. The Court (by Mr. Justice Hawley) in considering the service and construing Section 411 of the Code of Civil Procedure of California, states at page 687:

“Legal service of process upon a corporation which will give a Court jurisdiction over it, can be made only in the State where it resides by the law of its creation, or in a State in which it is *actually doing business at the time of service*, in the manner prescribed by the statutes of that State or of the United States. The question as to what kind of business, by a foreign corporation within a State, will justify a finding that it is engaged in business therein and violated a service upon its agent, has been very thoroughly elaborately discussed in the Circuit and Supreme Courts of the United States, and the general consensus of opinion is *that the the corporation must transact within the State some substantial part of its ordinary business by officers or agents appointed and selected for that purpose. . . .*” (Italics ours.)

Wilson v. McKinney Mfg. Co., 59 Fed. (2d) 332, is another case in this Circuit. It was an action for infringement of patent. Judge Louderback, of the Northern District, sustained motion to quash service of subpoena and dismissed action for want of jurisdiction. The sole question was whether or not the defendant had "A regular and established business" in the Northern District. Before the Court had jurisdiction to entertain this suit for infringement of patent the Court had to find "that the business conducted there must be such as has been recognized as giving jurisdiction over the foreign corporation." In other words, the test in such an action and that of when a foreign corporation is deemed to be doing business in State to give the Court jurisdiction over it is the same. The defendant maintained an office in San Francisco, had a Western Representative who for six years was in charge of the San Francisco Office and who introduced products of defendants to architects, builders and other users; the San Francisco Office had samples for display and for demonstration; on the door of the office was this lettering, "McKinney Manufacturing Company, Pittsburgh, Pennsylvania, J. Van Housen, Representative." The name of defendant was carried in the subscribers and classified advertising sections of the San Francisco Telephone Directory. The Court held, after reviewing many cases, that the above did not constitute the doing of business in California so as to subject defendant to the jurisdiction of our Federal Court, and affirmed the rulings of Judge Louderback.

In *Frawley, Bundy & Wilcon v. Pennsylvania Casualty Co.*, 124 Fed. 259, the Court states:

"But it is essential in every case in which personal jurisdiction over such a corporation (foreign) is

claimed, that *there shall have been an actual and substantial transaction of business by it within the state, and the process by which jurisdiction is sought to be obtained must have been served upon one who is truly a representative of the corporations.*" (Italics ours.)

(C) Applicable California Statutes and Decisions are:

This action was filed on December 17, 1931, and the purported service of process on the Secretary of State of the State of California was on March 1, 1932. Appropriate code sections in California on those dates have been set forth in earlier parts of this brief. They are: Section 411, Code of Civil Procedure; 405, Civil Code; 406a, Civil Code, and 407, Civil Code.

In *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, plaintiff salesman sued defendant foreign corporation for services rendered and process was served upon the purported business agent of defendant in San Francisco. Motion to Quash service was denied, judgment by default obtained, and on appeal the case reversed because of lack of jurisdiction. Among other things the Appellate Court states:

"A fundamental requisite for acquiring such jurisdiction is that the foreign corporation shall be doing business within the State at the time the process of the Court is served upon it.

". . . and the general consensus of opinion is that the corporation must transact within the State *some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose . . .*" (Italics ours.)

Referring to section 411, C. C. P., subd. 2 (above cited), the Court states:

“Under the provisions of this section, in order that the Court may get jurisdiction over a foreign corporation, it is requisite that such corporation *shall be ‘doing business’ within the State at the time the Summons is served* and that the service shall be made upon its agent who is managing that business or upon its cashier or secretary. We are of the opinion that upon the evidence before the Court it is clearly shown that the appellant was not doing business within this State at the time this Summons was served and that the Court should have granted the motion to set the service aside.” (Italics ours.)

In *Davenport v. Superior Court*, 183 Cal. 506, writ of mandate to compel the Superior Court to order its clerk to enter defaults of foreign corporations in a civil action was denied, and the Court stated at page 508, as follows:

“In order to justify a finding that a foreign corporation is so far engaged in business in this State that a valid service of Summons upon it in an action in this State, under section 411 of the Code of Civil Procedure, may be made upon its agent within this State, *‘the corporation must transact within the State some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose.’* ‘Legal service of process upon a corporation, which will give a Court jurisdiction over it, can be made only in the State in which *it is actually doing business at the time of service*, in the manner prescribed by the statutes of that State or of the United States.’” (Italics ours.)

(D) The Supreme Court of the United States has declared that for a foreign corporation to be doing business within any particular State or District that basically the foreign corporation must be doing business in such a manner and to such an extent that its actual presence is there established and in the absence of statutory requirements or express consent jurisdiction flows from those facts and does not rest on any fiction of constructive presence.

The case of *Bank of America v. Whitney Central National Bank*, 261 U. S. 171; 67 L. Ed. 594, the facts of which are cited *supra*, states (by Mr. Justice Brandeis) on page 596 thereof:

“The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the State or District in such a manner and to such an extent that its actual presence there is established.”
(Italics ours.)

(E) The Supreme Court of the United States has declared that for a corporation to be doing business within any particular State or District the said corporation must be present by its agents within said State or District who are authorized to transact its business therein.

The case of *International Harvester of America v. Commonwealth of Kentucky*, 234 U. S. 572; 58 L. Ed. 1479, the facts of which are cited *supra*, states (by Mr. Justice Day):

“For some purposes a corporation is deemed to be a resident of the State of its creation; but when a

corporation of one State goes into another, in order to be regarded as within the latter it must be there, by its agents, authorized to transact its business in that State.”

The case of *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79; 62 L. Ed. 587, the facts of which are cited *supra* (by Mr. Justice Day) states:

“The general rule deducible from all our decisions, is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the legal jurisdiction, and is, *by its duly authorized officers or agents, present within the State or District where service is attempted.*” (Italics ours.)

(F) The Federal Courts and the Courts of the State of California have declared that for a foreign corporation to be amenable to process within any particular State or District that it is necessary for the plaintiff to establish that the said foreign corporation was doing business within said State or District at the exact time that it was claimed that the said foreign corporation was served with process.

(1) FEDERAL CASES:

The case of *Golden v. Connersville Wheel Co.*, 252 Fed. 904, at page 908 states:

“It must be borne in mind that, in order that proper personal service may be made in a State upon a foreign corporation, it is necessary that such corporation be present in such State at the time of service. As, therefore, the presence of a foreign corporation is manifested only by its carrying on of business there,

it must appear, in such a case that the foreign corporation in question was, at the very time of the service, doing such business in the State where jurisdiction is sought.”

The case of *Doc v. Springfield Boiler & Mfg. Co.*, 104 Fed. 684, Circuit Court of Appeals for this the 9th Circuit, states at page 687:

“Legal service of process upon a corporation which will give a Court jurisdiction over it, can be made only in the State where it resides by the law of its creation, or in a State in which it is *actually doing business at the time of service*, in the manner prescribed by the statutes of that State or of the United States.” (Italics ours.)

(2) CALIFORNIA CASES:

The case of *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, cited *supra*, states at pages 584 and 585:

“A fundamental requisite for acquiring such jurisdiction is that the foreign corporation shall be doing business within the State *at the time the process of the Court is served upon it*.” (Italics ours.)

The case of *Davenport v. Superior Court*, 183 Cal. 506, cited *supra*, states at page 508:

“Legal service of process upon a corporation, which will give a Court jurisdiction over it, can be made only in the State in which it is actually doing business *at the time of service*, in the manner prescribed by the statutes of that State or of the United States.” (Italics ours.)

(G) The Federal Courts, the Civil Code of the State of California, and the Courts of the State of California, have all declared that for a foreign corporation to be doing business within any particular State or District, said foreign corporation must enter into repeated and successive transactions of its business other than interstate or foreign commerce; that isolated or incidental transactions do not constitute doing business but that the doing of business must be of a continuous nature and that a substantial part of the ordinary business of said foreign corporation must be done within said State or District.

(1) FEDERAL CASES:

The case of *Hutchinson v Chase & Gilbert*, 45 Fed. (2nd) 139, states at page 140:

“But a single transaction is certainly not enough, whether a substantial business subjects the corporation to jurisdiction generally, or only as to local transactions. There must be some continuous dealings in the State of the forum; . . .”

The case of *Doe v. Springfield Boiler & Mfg. Co.*, 104 Fed. 684, Circuit Court of Appeals for this the 9th Circuit, cited *supra*, states at page 687:

“The question as to what kind of business, by a foreign corporation within a State, will justify a finding that it is engaged in business therein and violated a service upon its agent, has been very thoroughly discussed in the Circuit and Supreme Courts of the United States, and the general consensus of opinion is *that the corporation must transact within the State some substantial part of its ordinary business by officers or agents appointed and selected for that purpose.*” (Italics ours.)

The case of *Frawley, Bundy & Wilcon v. Pennsylvania Casualty Co.*, 124 Fed. 259, cited *supra*, states at page 263:

“But it is essential in every case in which personal jurisdiction over such a corporation (foreign) is claimed, that there shall have been an actual and substantial transaction of business by it within the State, and the process by which jurisdiction is sought to be obtained must have been served upon one who is truly a representative of the corporation.”

(2) CALIFORNIA STATUTES AND DECISIONS:

Section 405 of the Civil Code of the State of California states:

“The term ‘transact intrastate business’ as used in this chapter, means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce.”

The case of *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, cited *supra*, states at page 585:

“. . . and the general consensus of opinion is that the corporation must transact within the State *some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose . . .*” (Italics ours.)

The case of *Davenport v. Superior Court*, 183 Cal. 506, cited *supra*, states at page 508:

“In order to justify a finding that a foreign corporation is so far engaged in business in this State that a valid service of Summons upon it in an action in this State, under section 411 of the Code of Civil Procedure, may be made upon its agent within this State, *‘the corporation must transact within the*

State some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose'." (Italics ours.)

(H) In the following cases, in addition to sending out salesmen to obtain orders for approval at home office, as in our case, the foreign corporation maintained either an office or had merchandise in the State or a warehouse and employees, and was still held not to be "doing business" in such State so as to subject it to the jurisdiction of the Courts of that State.

(1) FEDERAL CASES:

In *Green v. Chicago etc., supra*, 51 L. Ed. 916, the hiring of an office in Philadelphia by defendant for its agent, designating "him as District Freight and Passenger Agent and in many ways advertising to the public these facts . . ., and for conducting this business several clerks and various traveling passenger and freight agents were employed who reported to the Agent and acted under his direction", was held not to constitute "doing business" in the State.

In *Chaney Bros. Co. v. Massachusetts*, 246 U. S. 147, 62 L. Ed. 632 at 636, the maintaining by a Connecticut corporation of a selling office in Boston with one office salesman and having four other salesmen who traveled through New England soliciting orders, and maintaining in Boston samples of the goods sold, keeping copies and records of orders, maintaining a small deposit in a Boston bank to defray certain expenses of the Boston office, were held not sufficient to constitute "doing business" in Massachusetts. The Court (Mr. Justice Van Devanter) stated:

“The maintaining of the Boston office and the display therein of a supply of samples are in furtherance of the Company’s interstate business and for no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on. . . .”

In *Honeymoon v. Colorado Fuel & Iron Co.*, 133 Fed. 96, the maintaining of an office for registration of transfers of shares of stock and for meeting of directors of the corporation, together with the keeping of a bank account in the State was held not to constitute “doing business” and motion to set aside service of process was sustained.

In *Case v. Smith, etc.*, 152 Fed. 730, the maintaining of an office room in charge of a salaried sales agent who takes orders to be accepted and filled by the corporation at its Home Office, was held not to constitute a “doing of business” within that State such as to validate service of process therein.

In *Hillon v. Northwestern Expanded Metal Co.*, 16 Fed. (2nd) 821, the defendant, Illinois corporation, had salesmen traveling in Georgia and elsewhere and established an office in Atlanta, Georgia, known as “the Atlanta Office” and which was headquarters for the salesmen in the Southeastern States. The salesmen “were hired, discharged and paid through the Atlanta Office; one of the salesmen being designated as District Manager and he being in charge of the office and its activities and spending much of his time there looking after correspondence, keeping some records, and coordinating and directing the efforts of the other salesmen. . . . The Atlanta Office and its salesmen were from time to time, under

special requests, called upon to make investigation of disputes or to make collection of slow accounts, . . .” The Court held these facts were not sufficient to constitute the defendant “doing business” in Georgia and subject to the Courts in that State. The Court states:

“Where its business is, as has been stated, the maintaining of manufacturing and selling of goods, and all that is done in Georgia is the mere solicitation of orders, with information touching those who propose to submit the orders, there is no such doing business according to the *Green* case, as brings the corporation within the State for the purpose of suit.”

In *Zimmers v. Dodge Bros.*, 21 Fed. (2nd) 152, the defendant, a Maryland corporation, maintained in Chicago, a district representative whose duties were “to look after the interests of the defendant in the Chicago District and to make reports to the defendant from time to time; to investigate and interview men available as dealers and submit recommendations to the officials of the defendant corporation for final approval; to observe if sub-dealers get a supply of cars from dealers; to assist in settling disputes between dealers; to help the dealers with their sales and service problems; to stimulate sales contests among dealers; to advise the dealers in regard to their used car problems; to inform the dealers about methods of organizing; to talk to salesmen about problems of salesmanship; and to keep the defendant fully informed of conditions prevailing and events happening with respect to the industry in his District.” Although he took the lease to the Chicago office in his own name, he was reimbursed for his expenditures by checks from the defendant, the salary for his Secretary was paid by de-

fendant, and defendant was listed in the Chicago Telephone Directory. Judge Wilkerson held, in an enlightening and thorough opinion, that the above did not constitute "doing business" in Illinois, and dismissed the action for want of jurisdiction. He states at p. 156:

"As already pointed out, it is not any business activity which will constitute the necessary 'doing business'. Reference to adjudicated cases shows that quite generally it has been held that 'doing business' is not shown by the mere solicitation of orders through an employee, even though from an office employing in addition several clerks and agents, where a corporation has no property in the State other than the office itself, and where the corporation in the foreign district passes thereupon whether the orders shall be accepted, deals directly with the customer, all transactions being completed out of the State where the orders are solicited, and where the agent does not have authority to bind the corporation. . . . This is, of course, carrying on business of a certain kind and extent, but it is not the carrying on of business by the corporation in the foreign State 'in such a manner, and to such an extent, as to warrant the inference that it is present there'."

"It is the manner, extent and character of the activities of the corporation in the District of suit which is determinative. . . . Advertising, good will operations, maintenance of an office, listing its name in the telephone directory, or having its name on a door, while material, do not necessarily constitute 'doing business'."

"The policy of the law is that a defendant may be sued only in the District in which he is an inhabitant or in which he is 'found', which in the case of a cor-

poration means that *it shall be fairly clearly shown that it is 'doing business' IN THE DISTRICT in the meaning which is given to that expression by the decisions.*" (Italics and capitalization ours.)

In *Davega v. Lincoln Furniture Mfg. Co.* (C. C. A. 2nd), 29 Fed. (2nd) 164, the foreign corporation maintained an office in New York where it kept four or five suites of furniture as samples, had its name on the office door, had its name listed in the directory of the building where it displayed its samples, and had two bank accounts in New York City. Occasionally the salesman sold direct to purchasers some of the samples on hand in New York City. The salesman sometimes attempted to collect overdue accounts and to make adjustments subject to the Company's approval. The Court held this did not constitute "doing of business" in the State of New York so as to authorize service of process on its President while temporarily therein.

In *Maxfield v. Canadian Pacific Ry. Co.*, 70 Fed. (2nd) 982 (C. C. A. 8), it was held that the maintaining of an office for purpose of soliciting business in Minneapolis, Minnesota, and having "one person in charge of handling tickets, one ticket clerk, two employees soliciting passenger business, one stenographer, and two other solicitors" did not constitute "doing business" in the State of Minnesota.

(2) OTHER PERTINENT STATE COURT DECISIONS ARE:

In *Lebanon Mill Co. v. Kuhn*, 261 N. Y. S. 172, plaintiff, a Rhode Island corporation, selling textile fabrics, sued defendant in New York, and was held not to be doing business in New York so as to require it to qualify as a

foreign corporation before it could prosecute the issue, even where its name appeared on the directory board of the building in which its selling agent had its office in New York, where the invoices were mailed from the New York address and the invoices bore the name of the plaintiff and the New York address.

In *Penrose & McEniry v. Manogue*, 221 N. Y. S. 758, the defendant foreign corporation was held not present in New York for purposes of being served with process even though it employed two salesmen in New York State and maintained an office for the convenience of one of them in New York City.

In *Pennrich & Co. v. Juaniata Hosiery Mills*, 247 N. Y. 392 (1928), the opinion is as follows:

“Pennrich & Company, Incorporated, Appellant, v Juaniata Hosiery Mills, Incorporated, Respondent

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1927, which reversed an order of Special Term denying a motion to vacate service of the summons in the above-entitled action upon the grounds that defendant was not doing business within this State nor was the person served its managing agent. Defendant is a foreign corporation having its office and mill in Pennsylvania. Prior to August 16, 1926, Richard J. Nestler was its secretary. On that day he resigned and his successor was elected. Thereafter he came to New York City as sales representative of defendant. His duties were to solicit and receive orders for merchandise subject to acceptance or refusal by defendant at its office in Pennsylvania. He maintained an office on the door of which was the name of defendant. Its name was

also listed in the telephone directory and in the directory of tenants of the building. As late as November, 1926, the defendant's letterheads carried the notation 'New York Office, 366 Broadway'. The summons herein was served upon Nestler at this address in December, 1926. The following questions were certified: '1. Were the duties of and the authority conferred upon Richard J. Nestler such as to constitute him a managing agent of the defendant corporation within the meaning of subdivision 3 of Section 229 of the Civil Practice Act? 2. Did the Supreme Court of the State of New York obtain jurisdiction of Juaniata Hosiery Mills, Incorporated, by service of the summons herein upon said Richard J. Nestler within the State of New York?'

Maurice M. Cohn for appellant.

Emerson F. Davis and Daniel S. Murphy for respondent.

Order affirmed, with costs; second question certified, answered in the negative; first question not answered; no opinion.

Concur: Cardozo, Ch. J.; Pound, Crane, Andrews, Lehman, Kellogg and O'Brien, J. J."

In *Eastman v. Tiger Vehicle Co.*, 195 S. W. 336 (Texas), the corporation contracted with Eastman and others to sell vehicles in Texas, Louisiana, Arkansas, upon a commission basis. It was agreed between them that the corporation would send a car of its vehicles to Dallas, Texas, for exposition at the Texas State Fair, the corporation "to pay all legitimate expenses in that connection, such as floor space, display signs," etc. The car of vehicles was shipped, received and placed on exhibition.

Several of them were sold during the Fair but not delivered until the expiration thereof. Before the Fair closed Eastman and the others suspended business, did not account for the proceeds of the vehicles sold, and the corporation brought this action. The defendants defend on the ground the corporation was not permitted to transact business in Texas, contended that the having of vehicles on exhibition and the selling of the identical vehicles to purchasers constituted "doing business". The Court, in holding that such did not constitute doing of business states:

"The only fact which distinguishes the instant from the ordinary Interstate transaction involved in the sale, shipment and delivery of merchandise manufactured in one State and sent into another upon orders solicited by agents, is placing the vehicles on exhibition at the Texas State Fair which could be sold by appellants under their contract. The most that can be deducted from that circumstance is that it was done in the furtherance of the business of the principal and agent by advertising the commodity. Appellee was not transacting its business at the exhibit. The only business transacted there was the agent's business. Appellee was not selling vehicles there for it was conceded by appellants that they were doing that under the terms of their employment which by the rule of *Miller v. Goodman*, did not change the Interstate character of the transaction. Nor can the payment by appellee of the expenses incurred in arranging for the exhibit serve to change the actual transaction any more than could the payment by appellants of the freight thereon."

(I) The following cases directly involve the question of warehousing goods in the State:

In *Dixie Cotton Felt Mattress Co. v. Stearns & Foster Co.*, 185 Fed. 431 (C. C. A. 7), plaintiff, an Ohio corporation, brought suit in the District Court of the United States in Illinois to restrain infringement of trade names and unfair competition of trade by defendant, an Illinois corporation. Defendant contends plaintiff unable to maintain action because it was doing business in Illinois and had not qualified with Illinois Statute prohibiting foreign corporations doing business in the State from maintaining actions therein unless they complied with its requirements. Plaintiff had warehouses all over the country, including one in Chicago, it being advertised as a "sales room". The Court held that this did not constitute "doing business" in Illinois. Syllabus No. 2 of the decision reads as follows:

"Evidence that a manufacturing corporation of another State maintains a warehouse in Chicago, had, as a 'sales room', where it stores goods before sale, and from which deliveries are made, but which does not go to the extent of a showing that any sales are made there or at any other place than at the Home Office of the Company, is not sufficient to show that it is 'doing business' in Illinois."

In *Vermont Farm Machine Co. v. Hall*, 156 Pac. 1073, 80 Ore. 308, suit was on note of defendant given to plaintiff by the payee to whom plaintiff had sold cream separator and dairy accessories. Defendant, in defense, stated (1) plaintiff not a *bona fide* holder before maturity, and (2) plaintiff, a foreign corporation transacting business in Oregon, had not filed its declaration nor paid required

fees and therefore unable to prosecute the case. Judgment for defendant by jury and plaintiff appeals, is reversed and remanded for new trial. Facts show that "plaintiff had an arrangement with the Oregon Transfer Company in Portland, Oregon, whereby carload lots of its goods were sent for storage to a warehouse maintained by the transfer company. The warehouse had no authority to deliver any goods except on direct mail or telegraph orders from plaintiff's home office, where the orders taken by plaintiff's salesmen were accepted and which directed the warehouse to deliver to the purchaser the goods covered by such orders. Swanson (salesman) could see the goods in the warehouse and show the same to prospective purchasers . . ." Occasionally the salesmen, when they wanted some part of a separator, would go to the warehouse and open a box and take the part desired, and when replacements of these parts were received they would be replaced. The Court, in its opinion, states:

"A right to solicit orders for goods to be shipped in, to fill such orders is a necessary part of the Interstate sale of commodities. Every negotiation, contract, trade and dealing between citizens of different States which contemplates and causes such importation, is a transaction of Interstate Commerce. . . . In order to constitute doing business within this State by plaintiff, *its agent must have had ample authority to transact some substantial portion of plaintiff's business; that is, make complete sales here, and not merely take orders for goods.* (Italics ours.)

"It should be remembered that in the present case the evidence of plaintiff tended to prove that the goods were shipped from Vermont and stored at the terminal point, in the aid, as it may be, of rapid transit, merely anticipating orders of sale."

In *Rock Island Plow Co. v. Peterson*, 101 N. W. 616 (Sup. Ct. Minnesota), plaintiff, a corporation of the State of Illinois, engaged in the business of manufacturing and dealing in farm machinery in that and other States, maintained an agency in these States for the purpose of receiving, storing and delivering goods to purchasers in this State, to whom sales were made by orders taken by traveling salesmen, subject to the approval of plaintiff at its Home Office in the State of Illinois. The Court held that this did not constitute the doing of business in Minnesota, and stated:

“The warehouse company in Minnesota was the agent of plaintiff in this State for the purposes of performance only. Clothed with the naked power and authority to deliver the goods and to deliver to their customers goods stored with it when directed and ordered so to do. It was a mere distributing agency. The case would be substantially the same if the goods had been consigned to plaintiff at Minneapolis and by some other agent reshipped to defendant. It comes, it seems fair to say, squarely within the case of *Caldwell v. N. Caro*, 187 U. S. 622, 23 Sup. Ct. 299, 47 L. Ed. 336.

“Our conclusions are that the transaction here in question amounted to *Interstate Commerce*.”

(J) The fact that the foreign corporation has a demonstrator in the State does not change the nature of the transaction.

In *Real Silk Hosiery Mills v. City of Portland*, 268 U. S. 325, an ordinance requiring solicitors to obtain a license was held unconstitutional. The fact that the plaintiff employed 2000 representatives to solicit in the most

important cities and points of the Union and has built up a large business of ten million dollars per annum and had twenty operators in Oregon, did not subject those solicitors to a license tax, for the business of the plaintiff was Interstate Commerce and the defendant City had no authority to burden the same.

In *Lyons v. Federal System of Bakeries of America*, 290 Fed. 793 (C. C. A. 7), defendant, foreign corporation, sold patent bakery equipment to plaintiff and agreed to furnish an experienced baker for the purpose of enabling plaintiff to start with experienced help and to immediately put its business in a good working condition. The Court says that this fact "was a mere and trivial incident to the main Interstate transaction."

In *Eastman v. Tiger Vehicle Company*, 195 S. W. 336, *supra*, the Court held the fact that vehicles were on exhibition at a State Fair and that there were agents present selling and taking orders for the same and demonstrating their merit, did not make the transaction Intrastate business.

In *Harrell v. Peters Cartridge Co.*, 129 Pac. 872 (Sup. Ct. Ok.), the syllabus succinctly states the situation as follows:

"Where a foreign manufacturing corporation having such a contract (that of domestic mercantile corporation) sends its traveling agents into the domestic State for the purpose of advertising goods and pushing the sales by giving exhibitions and demonstrations of the merits of such goods, and by assisting the agents of the domestic corporation in getting customers and orders for such goods, such orders to be filled by the domestic corporation out of its stock,

such acts or transactions on the part of such agents do not constitute 'doing business' within the State by the foreign corporation, and service of Summons upon the Secretary of State is not valid service on the foreign corporation."

The burden of proof is upon the plaintiff to clearly show that at the time of the purported service of process on the Secretary of State the defendant was doing business within the State of California. (*Jameson v. Simonds Saw Co.*, *supra*.) Not only has plaintiff failed to discharge said burden of proof but defendant submits it is conclusively shown to the Court by the evidence and the law that it was not doing business in the State of California and subject to the jurisdiction of its Courts.

The affidavits filed by the plaintiff (On July 26, 1935 [Tr. 225]; and on August 14, 1935 [Tr. 235]), after the judgment was entered (On May 10, 1935 [Tr. 220]), after the Motion for New Trial was filed (On July 9, 1935 [Tr. 220]), but before it was finally heard (On September 9, 1935 [Tr. 239]), in opposition to the Motion for New Trial, have not been considered in the above discussion for the reason that they are clearly incompetent, irrelevant and immaterial. A Motion to Strike the same from the records was made by defendant at the first session of Court, subsequent to their filing, and which Motion was denied and an exception taken [Tr. 239]. This ruling is assigned as an error in this appeal [A. E. 58; Tr. 288]. The jurisdiction of the Court over the person of defendant must be clearly established by the plaintiff and particularly at the time when that jurisdiction is challenged and the question is before the Court. It is the condition of the record at the time the challenge to the jurisdiction

is being acted upon by the Court that is to be considered and which is to determine whether or not such jurisdiction existed. These affidavits are no more properly before the Court, either District or this Appellate Court, in support of jurisdiction over the person of defendant, than would be affidavits which would seek to establish the amount of damages sustained by the plaintiff, or that other letters had been sent, or of any other evidentiary matter which must be necessarily before the Court at the time the judgment is entered. All facts in support of a judgment must be in the record and be before the Court prior to and at the time of its entry. The judgment stands or fails as the record exists at the time of its entry. Nothing thereafter filed can aid to nor detract from the facts supporting the judgment. Additional affidavits may be used in support of or in defense of a motion for new trial where the discretion of the Court is called upon but they are absolutely incompetent to supply any facts to support the judgment which has already been entered. If the Court desired to consider those affidavits upon the jurisdictional question, the procedure would have been for the Motion for New Trial to have been granted which would have placed the question of jurisdiction of the Court over the person of the defendant anew before the Court. Having denied the Motion for New Trial the affidavits can only be considered in connection with that motion and not to supply evidence either in support of the judgment or the jurisdiction of the Court.

III.

THE DISTRICT COURT ERRED IN OVERRULING DEFENDANT'S MOTIONS TO DISMISS MADE AT COMMENCEMENT OF THE TRIAL, AND ITS OBJECTIONS TO THE INTRODUCTION OF ANY EVIDENCE AND MADE UPON THE GROUND THAT THE COMPLAINT DID NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

Assignments of Error 7, 8 and 9 [Tr. 263-4] are covered by the above point, and since the assignments and objections were made on the same grounds they will be here considered under the one point.

At the trial, out of the presence of jury and before any evidence was introduced, defendant moved "to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action." [Tr. 127.] The Court refused to hear counsel, stating, "I will not entertain at this time a Motion addressed to the sufficiency of the complaint because of its being entirely untimely" and "Proceed in the manner indicated, and your Motion is denied; that is I will decline to hear it at this time because, out of all fairness to the Court, such a motion should have been presented a long time ago if there was any intention on the part of the defendant to present any such question as that." [Tr. 127-8.] After plaintiff's opening statement the Motion was renewed and particularly urged on the ground that the complaint failed to allege jurisdictional facts and which Motion was denied. [Tr. 128.] After the first witness was sworn and before she testified defendant objected to the introduction of any evidence because the complaint did not state a cause of action [Tr. 129], and which was denied. To these rulings

defendant took exceptions. The status of the complaint at the time these motions and objections were urged is determinative of whether or not the complaint did state a cause of action against the defendant and if the Court had jurisdiction over the defendant. In every case the first question which confronts the Court is that of jurisdiction, both over the subject matter and of the party; and this jurisdiction must affirmatively appear upon the record. It is error to proceed unless the jurisdiction of the Court be so shown. The absence of jurisdictional facts cannot be waived and the failure of the record to disclose such facts should be noticed by the Court *sua sponte*. Not only is it proper but is absolutely necessary for a Court to first determine if it has acquired jurisdiction over the person of the defendant before there should be any proceeding or action upon the merits of the controversy. There is no presumption in favor of jurisdiction. There is no presumption that the defendant New York corporation was doing business or was present in the State of California. The facts requisite to Federal jurisdiction must affirmatively appear by the complaint, otherwise it is presumed that Federal jurisdiction is absent and the case must be dismissed. Since the failure of the record to disclose jurisdictional facts should be noticed by the Court *sua sponte* it follows *a fortiori* the Court should willingly and immediately consider the record to ascertain if it had jurisdiction when the defendant expressly urges and raises the question. By making two motions to dismiss and by objecting to the introduction of any evidence it is difficult to see how the defendant could more effectively present the jurisdictional question.

The Appellant urges that the complaint was fatally defective in these particulars:

1. **There Was No Allegation That the Defendant Was Doing Business in California.**

Paragraph II of the complaint alleges the defendant to be a New York corporation. Nowhere is there any reference to the defendant doing business in the State of California. This is an indispensable allegation. In order that a Court may acquire jurisdiction over a foreign corporation it is requisite that such corporation shall be "doing business" within that State at the time the summons is served. There is no presumption that a foreign corporation is either doing business in or is present in the State in which it is sued. Jurisdiction over the defendant must affirmatively appear by allegations in the complaint *and in the case of a foreign corporation the complaint must allege it to be engaged in business in the State of the forum.* This is true in both State and Federal Courts and particularly in Federal Courts where all of the peculiar facts requisite to Federal jurisdiction must affirmatively appear. These principles are stated and enunciated by the cases of:

- St. Claire v. Cox*, 106 U. S. 353, 26 L. Ed. 222;
Central Grain and Stock Exchange v. Board of Trade, 125 Fed. 463, (C. C. A. 7);
Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235, C. C. Penn.;
Hurley v. Wells-Newton Nat. Corp., 49 Fed. (2nd) 914, D. C. Conn.;
Jameson v. Simonds Saw Co., 2 C. A. 582;
Herron Co. v. Westside Electric Co., 18 Cal. App. 778;
U. S. Asphalt Co. v. Comptoir, etc., 151 N. Y. S. 604.

In each of the foregoing cases a question before the Court was its jurisdiction over a foreign corporation where there was no allegation in the pleadings that said defendant was doing business in the State of the forum and in each of the cases it is held that such allegation and showing is absolutely indispensable to jurisdiction over the person of such foreign corporation.

In *St. Claire v. Cox*, *supra*, the Supreme Court stated the rule:

“We are of the opinion that when service is made within the State upon an agent for a foreign corporation, it is essential, in order to support the jurisdiction of the Court, to render a personal judgment that it should appear somewhere in the record, either in the application for the writ, or accompanying its service, or in the pleadings or the findings of the Court, that the corporation was engaged in business in the State.”

In *Central Grain and Stock Exchange v. Board of Trade*, *supra*, the Circuit Court for the Seventh Circuit states (Syllabus 3):

“A return to process issued for a foreign corporation as defendant in an equity suit in a Federal Court, showing service on an officer of the corporation, is not sufficient to authorize the Court to entertain jurisdiction, where it does not appear either by such return or from the record that the corporation was at the time engaged in doing business in the State.”

In *Earle v. Chesapeake & O. Ry. Co.*, *supra*, the Court states:

“Nowhere upon the record is there any averment that the defendant is doing business in the State of

Pennsylvania, and in view of this fact, the absence of such averment from the Marshal's return is said to constitute a fatal defect therein. In my opinion, this proposition is sound."

and at page 237 the same Court states:

"Therefore the present record should show somewhere that the defendant is doing business in this commonwealth, and, as the fact is nowhere else averred—neither in the praecipe for the summons, nor in the summons itself, nor in the statement of claim—the Marshal's return should have supplied the essential fact."

In *Hurley v. Wells-Newton Nat. Corp.*, *supra*, the Court states at page 917:

"Consequently, I hold here that, since the record fails affirmatively to show jurisdiction over the person, the presumption is that such jurisdiction is lacking. It follows that there was no need for the defendant to resort to facts outside the record to support its motion. And the plaintiff's contention that the point could be taken only on plea, raising an issue of fact, therefore fails."

2. There Was No Allegation That the Allegedly Libelous Letter Was "of and Concerning" the Plaintiff.

Reference to the letter in question [Tr. 5] shows that at no place therein is the plaintiff therein mentioned either by name or by reference. Reference is made to the manufacturer of "French Veneer" as being "these people", "them", "their", "they", "his" and "he". There is not even a reference to the manufacturer of the product in the

feminine gender. Where the allegedly libelous communication does not name the plaintiff it is absolutely necessary that the pleadings allege that the communication was “of” and “concerning” such plaintiff and that third parties knew and understood that the plaintiff was meant in the communication. We examine the complaint in vain to find any such allegation.

The following cases clearly establish these principles:

DeWitt v. Wright, 57 Cal. 576;

Haub v. Friermuth, 1 Cal. App. 556;

Des Granges v. Crall, 27 Cal. App. 313;

Vedovi v. Watson & Taylor, 104 Cal. App. 80.

In *DeWitt v. Wright*, *supra*, the communication referred to “he” and “him”. The complaint alleged that these words were intended by the defendant to mean the plaintiff. There was no allegation that the plaintiff knew the plaintiff was meant. The Supreme Court stated a Demurrer to the complaint should have been sustained, and stated:

“There is nothing in the complaint to indicate that R. O. DeWitt knew who was meant by the words ‘he’ or ‘him’; and if he did not know, it is clear that one of the essential elements of the cause of action was wanting. By Sec. 460 of the Code of Civil Procedure, it is rendered unnecessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the de-

famatory matter, but it is sufficient to state, generally, that the same was published or spoken concerning plaintiff; *but this section, in our opinion, does not do away with the necessity of the averment that the person or persons who read the writing or heard the words knew the plaintiff was meant.* Without such knowledge, as already observed, there could be no cause of action.” (Italics ours.)

That both Court and counsel for plaintiff, upon further consideration, considered such allegation indispensable is shown by the fact that during the midst of the defendant’s argument for a nonsuit, upon the second day of trial, the plaintiff moved for and the Court made an order that the complaint be amended to the effect that the letter was intended to refer to the plaintiff. [Tr. 201.] This, however, does not cure the defect extant at the time of these motions to dismiss and objections to evidence.

3. There Is No Allegation That the Communication Was Published.

It is elementary that there can be no libel without a publication of the alleged libelous matter. The complaint alleges that the defendant “did wilfully and maliciously compose, publish and cause to be published a letter addressed to . . .” There is no allegation that the letter was sent to or received by the addressee. Alleging that the plaintiff did “publish and cause to be published”

is nothing but pleading a legal conclusion and ineffective for any purpose. That there must be proper averments of a publication before it can be considered libelous is established by the following authorities:

16 *Cal. Jur.* 29;

17 *R. C. L.* 315;

36 *Corp. Jur.* 1227.

4. There Are No Allegations of Actual Malice, or Malice in Fact, With Reference to the Alleged Communication.

The communication upon its face shows that it is privileged. It is by a manufacturing concern to a dealer and concerns the product made by the manufacturer and sold by the dealer. Each party to the communication is interested in the subject matter. All *bona fide* statements in the performance of any duty, whether legal, moral or social, even though of imperfect obligation, when made with a reasonable purpose of protecting the interest of the person making them or the interest of the person to whom they are made, are privileged. Where the occasion of the communication furnishes a *prima facie* legal excuse for making it, it is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse. The communication in question is therefore, upon its face, privileged. It is then necessary for plaintiff to allege actual malice to

destroy its privileged character. These principles are clearly established by the following citations:

California Civil Code, Secs. 47 and 48;

Snively v. Record Publishing Co., 185 Cal. 565, at 574;

Massee v. Williams, 207 Fed. 222 at 230, C. C. A. 4;

Wise v. Brotherhood of Locomotive F. & E., 252 Fed. 961, C. C. A. 8;

36 *Corp. Jur.*, p. 1265, Sec. 250;

O'Connell v. Press Pub. Co., 214 N. Y. 352;

Ashcroft v. Hammond, 197 N. Y. 488;

Bowsky v. Cimiotti Unhairing Co., 72 N. Y. App. Dec. 172.

Section 47 of California Civil Code states:

“Privileged communications. A privileged communication is one made . . . (3) in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford reasonable ground for supposing the motive of the communication innocent, or . . .”

Section 48 of California Civil Code provides:

“Malice not inferred. In the cases provided for in Subdivisions 3, 4 and 5 of the preceding Section, malice is not inferred from the communication or publication.”

In *Snively v. Record Publishing Co.*, *supra*, at 575, the California Supreme Court says that a communication though false is privileged when given "in almost any relation where one person is under a duty to give information to another and does so in good faith and without malice."

"The word, malice, as used in Section 48 of the Civil Code, *supra*, means 'actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as "a wrongful act done intentionally without just cause or excuse", or as, "the absence of legal excuse".' . . . Actual malice is 'a state of mind arising from hatred or ill will evidencing a willingness to vex, annoy or injure another person and the motive and willingness to harass, vex or injure anyone'."

Malice is not to be inferred from the communication or publication (C. C. 48). In fact the employment of strong words, if considered justified by the defendant, is not evidence of malice. A person is privileged to employ, with due regard to his interests, such words as the situation compels. Allegations of actual or express malice must therefore be made to render a privileged communication libelous and such allegations must not be in the nature of legal conclusions. These principles are supported by the cases of:

Jones v. Express Pub. Co., 87 Cal. App. 246, at 256;

Locke v. Mitchell, 84 C. A. D. 336;

Snively v. Record Pub. Co., 185 Cal. 565, at 576-7.

In *Jones v. Express Pub. Co.*, *supra*, at 256, the Court states:

“And when the facts clearly constitute a privileged communication even though the language employed under other circumstances might be slanderous *per se*, the very privilege creates a presumption that the communication is used innocently and without malice. (*Newell on Libel*, 383, Sec. 342; *Jones on Evidence*, 3rd ed., 34, Sec. 29.)”

In *Locke v. Mitchell*, *supra*, the complaint alleged concerning the letter set forth in the complaint and which was a privileged communication as being from a secretary to his constituents “that the said charges made and published in said letter were and are false, malicious and scandalous and did and do expose plaintiff to hatred, contempt and ridicule.” A Demurrer to the complaint was sustained, the Court stating at 339:

“The complaint in the case at bar cannot be held to adequately allege malice in fact. No facts are alleged as a basis for the claim that malice existed at the time the communication was published. The allegation that ‘said charges made and published in said letter . . . were and are false, malicious and scandalous’ is obviously a mere conclusion, hence the contention of Respondent that the complaint does not state a cause of action must be upheld.”

The Conformity Act (28 U. S. C. A. 724) makes the California practice pleadings, forms and methods of proceedings in civil cases applicable in the District Courts. In California the insufficiency of the complaint to state a cause of action may be urged at any stage of the proceeding or may be raised by an objection to the introduc-

tion of evidence at the commencement of the trial even though a Demurrer to the complaint is not filed.

Reed v. Thomas, 99 Cal. App. 719;
Bonney v. Petty, 125 Cal. App. 527;
Chapman v. Gillette, 120 Cal. App. 122;
Whittaker v. McCalla Co., 127 Cal. App. 583;
Taylor v. Lewis, 132 Cal. App. 381;
Morel v. Morel, 203 Cal. 417.

In *Reed v. Thomas*, *supra*:

“Where a complaint absolutely fails to state a cause of action a Demurrer is not necessary but the defect may be raised at any stage of the proceeding and in any manner which presents the objection.”

In *Chapman v. Gillette*, *supra*:

“The insufficiency of a complaint because it fails to state facts to constitute a cause of action may be raised by an objection to the introduction of evidence even though a Demurrer to the complaint is not filed.”

The following Federal cases show that the practice followed by the defendant is proper in Federal Courts:

Lewicki v. Wiardi Co., 213 Fed. 647;
Jack v. Armour, 291 Fed. 741;
Delaware L. W. Ry. Co. v. Scales, 18 Fed. (2nd) 73.

It is respectfully urged, and in view of the foregoing the District Court prejudicially erred in overruling defendant's Motions to Dismiss and objections to introduction of evidence.

IV.

**DISTRICT COURT PREJUDICIALLY ERRED
IN HIS RULINGS UPON OBJECTIONS TO
ADMISSION OF EVIDENCE AND UPON
MOTIONS TO STRIKE THE SAME.**

Assignments of Error 5 and 6 [Tr. 262], 11 to 22, inclusive [Tr. 265-73], 24 to 34, inclusive [Tr. 274-78] and 36 to 42, inclusive [Tr. 278-82], are all covered by the above point. For convenience these errors and Assignments of Error will be grouped as follows:

- 1. The Court Erred in Permitting the Plaintiff to Testify Upon the Reopening of the Defendant's Motion to Quash Service of Summons, About a Purported Conversation With an Alleged "Bookkeeper" of the Public Warehouse in San Francisco in Which Defendant Warehoused Some of Its Products, and in Denying Defendant's Motion to Strike the Same Upon the Grounds That It Was Clearly Hearsay. [A. E. 5 and 6; Tr. 262.]**

After the Court had vacated its order quashing service of summons [Tr. 66] and granted plaintiff's Motion to reopen the hearing thereon to present testimony of three specific witnesses [Tr. 68] the Court permitted plaintiff to testify to a conversation with an alleged "bookkeeper" at the public warehouse in San Francisco, over defendant's objection that the same was immaterial, incompetent and purely hearsay, wherein he stated to her that customers could come to the warehouse and purchase Liquid Veneer, have it shipped to them, that Mr. Mack (a traveling salesman for defendant) brought all of his orders there to have them shipped, that plaintiff could purchase Liquid

Veneer from it and could have it shipped to her address [Tr. 71]. Motion to strike the same was made on the ground "it now appears to be purely and entirely hearsay, a recital of statements from one on which no foundation is laid," and which Motion to Strike by the Court was denied in that he reserved a ruling thereon [Tr. 78]. At the same hearing witnesses other than those specified in the Order of the Court reopening the case were permitted to testify over defendant's objections, and certain invoices were introduced [Tr. 68-73] showing in some instances that balances of orders were shipped from a warehouse in San Francisco. Defendant later filed two affidavits explaining that for purposes of economy carload lots or bulk shipments were occasionally sent to a central point, such as a warehouse in San Francisco, where shipments were broken up and redistributed to fill orders theretofore placed by its customers [Tr. 82-87]. These affidavits fully explained the notation at the bottom of the invoices referring to the balance of the order being shipped from a warehouse. They denied that any person could order goods other than through the Home Office, in Buffalo. The Court then made its order, stating "the oral evidence taken is sufficient, being uncontradicted, to show the defendant was doing business in California. Motion to Quash is denied with right to defendant to renew the same at the trial. Exception to defendant." [Tr. 87.] *The only uncontradicted evidence supporting the order of the Court is that of Mrs. Smuckler with the alleged "book-keeper".* If the Court erred in admitting the testimony

of this alleged conversation then the Order of the Court denying the Motion to Quash falls of its own weight.

The declaration of an agent is admissible only after proof of the agency, and then the declaration must be within the scope of the agency.

Section 1870, California Code of Civil Procedure, provides:

“In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency during its existence.”

It is essential that there must be first a showing of agency (*Umstead v. Automobile Funding Co.*, 44 Cal. App. 16), and then that the person speaking is in a position of authority to speak (*City of Stockton v. Vote*, 76 Cal. App. 369).

There is absolutely no evidence that the alleged bookkeeper was an authorized agent of either the public warehouse or of the defendant and even if it be assumed that he were an agent of the warehouse, it would not lie within the scope of authority of a bookkeeper to make the statements and representations such as he is asserted to have made. The admission of this hearsay evidence and the refusal to strike the same clearly constitutes reversible error when the order of the trial court finding the defendant to be engaged in doing business in California is predicated wholly and solely upon this asserted conversation because it was uncontradicted by the defendant.

2. The Court Erred in Admitting Into Evidence, Over Defendant's Objection, a Copy of Letter Dated June 2, 1931, Addressed to Young's Market, and in Denying Its Motion to Strike the Same for the Reason That It Was a Privilege Communication, Did Not Mention or Refer to the Plaintiff, and the Complaint Did Not Allege That the Letter Was of or Concerning the Plaintiff.

Assignments of Error 11 and 12 [Tr. 265-6] are covered by the above point.

In plaintiff's complaint she sets forth *in haec verba* a copy of a letter from defendant to Young's Market, dated June 2, 1931 [Tr. 5]. It is self-evident that it is a business communication to a person interested in its contents by one who is also interested therein and by one who stands in a business relation to the addressee. It is also evident that defendant was duty-bound both as a matter of business courtesy and as legal notice or warning to express its views upon what it considered an infringement of its trade-marked "Liquid Veneer" and upon the possible liability of the maker of the infringing product and of the Young's Market as a seller thereof after due notice. Business communications between interested firms are and must necessarily be privileged. The seller of a product which another claims as an infringement of its product is entitled, as a matter of business courtesy, to be warned of such fact and its future possible liability. In these days of strenuous business competition and marketing of many products under various names an innocent

retailer could unsuspectingly be selling an infringing product and be open to an action for an injunction or for damages, or for both. Notice of the claim of infringement by one claiming to be damaged thereby to one distributing the questioned product should certainly be protected by the law as a privileged communication and Appellant asserts that such is the law.

California Civil Code, Sec. 47, *supra*;

36 Corp. Jur., 1265, Sec. 250;

Snively v. Record Pub. Co., 185 Cal. 565, at 575;

Locke v. Mitchell, 84 C. A. D. 336;

Massee v. Williams, 207 Fed. 222, at 230;

Wise v. Brotherhood of Locomotive F. & E., 252 Fed. 963;

Ashcroft v. Hammond, 197 N. Y. 488;

O'Connell v. Press Pub. Co., 214 N. Y. 352;

Bowsky v. Cimiotti Unhairing Co., 72 N. Y. App. Dec. 192.

The complaint does not allege that defendant published or forwarded this communication to anyone other than the addressee. It does allege defendant did compose and publish and caused to be published this letter. This is but a legal conclusion and is not an allegation of fact. And even if plaintiff did intend to allege a publication beyond the interested parties no attempt was made to prove that anyone other than the addressee ever saw the letter. It does not mention the plaintiff. The complaint does not allege that the letter was of or concerning the

plaintiff nor that the addressee knew the letter was of or concerning her. It is indispensable that a plaintiff in a libel suit, by proper allegations in her complaint, set forth or show the alleged libelous communications to be of and concerning her. The state of the pleadings and the objections to this evidence when made is what will determine the propriety of the objection. Clearly at the time the copy of letter was offered as evidence and objected to it was inadmissible. Counsel for plaintiff and the Court, after defendant's strenuous objections, during the trial, considered such allegation necessary for after plaintiff rested her case in the second day of the trial and during the course of defendant's argument for a nonsuit, counsel for plaintiff moved for, and the Court granted over defendant's objection and exception, an order permitting plaintiff to amend her complaint to the effect that the letter was intended to refer to the plaintiff [Tr. 201]. It was highly improper and was judicial error for the Court to permit such an amendment at such a stage of the proceeding (and which is assigned as Error No. 44 [Tr. 282], and will hereafter be discussed), and should not be permitted to cure a fatal defect existing at the time the offer and objections were made.

3. The Court Erred in Admitting Into Evidence, Over Defendant's Objection and Exception, and in Denying Defendant's Motion to Strike All of the Letters Between the May Co. and the Defendant and the Oral Testimony of the Employees of the May Co., as the Complaint Alleged Damages From the Sending of One Letter Only, to Young's Market Co., and Above Evidence Was Admitted for the Purpose of Showing Damages.

Assignments of Error 13 to 22, inclusive [Tr. 267-73]; 24 to 34, inclusive [Tr. 274-77]. They are grouped in this one point as this evidence was all admitted upon the same theory and the objections thereto and motions to strike were made upon the same grounds. If the objections thereto were proper the same ruling will cover the motions to strike.

The complaint sets forth *one* letter, dated June 2, 1931, sent by defendant to "Young's Market" [Tr. 5]. In Paragraph IX plaintiff alleges, "that by reason of *the said* false, malicious and defamatory *publication* aforesaid, plaintiff has been and is greatly injured and prejudiced and that the reputation of her business has been prejudiced and injured and she has lost and been deprived of a great amount of profit . . ." [Tr. 8.] Plaintiff called as a witness Benjamin L. Strauss, Vice-President of the *May Company of Los Angeles* [Tr. 138] who produced six letters from the defendant to the *May Company* and respectively dated March 27, 1929 [Pl. Ex. 2, Tr. 139]; April 19, 1929 [Pl. Ex. 4, Tr. 143]; April 30, 1929 [Pl. Ex. 5, Tr. 146]; April 13, 1931 [Pl. Ex. 6, Tr. 148];

April 23, 1931 [Pl. Ex. 7, Tr. 151]; May 1, 1931 [Pl. Ex. 8, Tr. 153]; and copy of one letter from the May Company to defendant, dated April 2, 1929 [Pl. Ex. 3, Tr. 141].

Objections to their admission in evidence were timely made by defendant upon the ground that each was and all of said letters were irrelevant, incompetent and immaterial, inadmissible under the pleadings, had no relation to the cause of action alleged, had no bearing upon the issues in this case, were to a concern other than the addressee of the letter set forth in the complaint, and were in some instances two years prior to the date of the letter set forth in the complaint, and all of which objections were overruled and exceptions were noted. [Tr. 138-9; 142-3; 146-7-8; 151; 153; 141.]

Plaintiff also introduced oral evidence of Mr. Strauss to the effect that plaintiff's product "French Veneer" was taken off sale by the *May Company* in 1928 and kept off sale during 1929 and a portion of 1930 [Tr. 156; 170] because of the letters received by it and aforementioned; that no complaints had been made to him; that the public or managers of departments were confused as to the product of the plaintiff or defendant [Tr. 161-2]; that they suggested in 1930 that plaintiff change the name of her product and restore it as "French Polish" because the demand for it was great and it had a customer following [Tr. 162]; that *May Company* contemplated placing plaintiff's product in other of its stores [Tr. 164] but did not as it was "not wanting to buy litigation" [Tr. 165], and that its decision not to place plaintiff's product in its other stores had no relationship to the quality or value of the product for sales purposes [Tr. 165]. He also was

permitted, over defendant's objection, that it was irrelevant, incompetent, immaterial and improper, that the witness was not properly qualified, that there was no evidence on which to base such a hypothetical question and that it was opinion evidence calling for the witness' conclusion and was speculative [Tr. 166], a hypothetical question, to-wit: "Assuming that, from your experience as a merchandiser for 30 years, and your intimate knowledge of this product and its competitive quality compared with other products of the same type, and your intimate personal knowledge of the plaintiff in a business relationship in your experience with her in the May Company, and assuming that there were no harassment of her conduct, and assuming that no threatening letters were sent to her customers by the defendant, would you say that the plaintiff could have extended her business substantially beyond the bounds that you knew it," and which the witness answered by stating that plaintiff could have increased her business very materially because her product was genuine and she had created a demand for it and had a following after it was sold. [Tr. 166.]

William E. Max, a buyer of house furnishings for May Company, was also permitted to testify, over defendant's objections and exceptions to some of the same matters about which Mr. Strauss testified and which Appellant contends to be error in Assignments of Error 33 and 34 [Tr. 277]. As his evidence is merely cumulative to that of Mr. Strauss, no special discussion will be made of it because if the evidence of Mr. Strauss is inadmissible then certainly will be that of Mr. Max.

Motion to Strike the aforementioned Exhibits and oral testimony from the evidence were timely made upon the

grounds that this evidence all related to events which occurred prior to the date of the letter set out in the complaint, June 2, 1931, and which Motions were denied and exceptions taken [Tr. 156-60]. The Court allowed all of the foregoing letters and oral testimony into evidence for the purpose of showing *damages* only. Counsel for plaintiff offered this evidence *for the purpose of showing the measure of damages* only. This clearly appears from the proceedings before the Court at the time the offers and objections were made. For instance, after counsel for defendant made a Motion to Strike the evidence of Mr. Strauss concerning the dealings between the May Company and the plaintiff, the Court asked counsel for the plaintiff the importance of such evidence and counsel replied that it was for the purpose of "*showing the measure of damages, Your Honor, now.*" This product French Veneer was destroyed as a business of the plaintiff on a certain date. She subsequently, maybe two or three years later, had to start all over again and try to sell a new product. *We want to show the extent of the damage*" [Tr. 156-7], and later he stated "and for a period of several years *the plaintiff had no product with the May Company*, and then when she did put a product on at the suggestion of Mr. Strauss, because of reasons which he can explain, she put on a new product with a new name, meeting new sales resistance. *The jury has a right to consider these elements in assessing the damages to be awarded.*" [Tr. 157.] The Court then admitted this testimony for the purpose of showing the extent of plaintiff's damage.

That the Court clearly admitted this evidence for purpose of showing *damages* appears when in response to the

urgent objections of counsel for the defendant to the admissibility of the letters to the May Company the Court stated in the presence of the jury:

“I think the allegation of the complaint that I have just read is clear and distinct to the effect that letters were written, is it not? Certainly it is, because I just read the allegations. *Now, in the absence of a motion for particulars or something of that sort, I think the letters are admissible. They are already admitted, at any rate, and it is a matter for the jury to pass upon, to say whether the plaintiff suffered any damage, of course, and whether, if she did suffer damage, that was attributable or reasonably the result of the letters.*” [Tr. 158.]

The defendant still respectfully urging that the letters were incompetent, the Court read Paragraph IX of the complaint and stated to counsel for the plaintiff, “Unless your letter is the cause of your damage, these letters, then, while they are relevant and material as showing intent, are not an element of the damage.” [Tr. 159.] But counsel for the plaintiff continued to insist that the letters to the May Company and the evidence of its two employees was admissible for the purpose of showing damages to the plaintiff, claiming that the allegations of his complaint were broad enough to claim damages arising from the letters to the May Company [Tr. 159-60]. To this view the Court assented and finally overruled defendant’s objections and Motions to Strike, stating, “In the absence of a specific objection heretofore made as to what was included, or an analysis of this complaint, *I would feel compelled to say that the basis of damage may reasonably be held to include all of the previous letters.* Undoubtedly, I think that was the intention.” [Tr. 160.]

That the Court overruled defendant's objections to the May Company letters and to the evidence of its two employees upon the theory and basis of showing damages to the plaintiff and not for showing motive of the defendant or for showing malice further very clearly appears when upon the cross examination by counsel for defendant of Mr. Max, a witness for the plaintiff, he sought to bring out the location of the stock room of the May Company for the purpose of impeaching the evidence of Mr. Strauss that there was no French Veneer in the May Company during the years 1929-31, the Court interrupted, asking the materiality of such cross examination, and counsel stated that it was his contention that the letters and evidence of these two witnesses from the May Company had no relevancy but as his objections to their admission had been constantly overruled he was going to do the best he could to correct the situation and to which the Court stated [Tr. 173-4]:

"The letters and all are admissible as to the case of the defendant, as to the motive of the defendant.

Mr. Sheehan: Are you limiting it to that, your Honor, only?

The Court: *No, I am not limiting it to that because the question of damages is involved.* I think that your examination is entirely collateral and on an entirely irrelevant matter as to the details of the location of the stock room, for instance. Sustained.

Mr. Balter: I will make the objection, your Honor."

These objections by counsel for the defendant, the arguments thereon and statements of the Court were all made in the presence of the jury. It is only natural that

the jury would develop an antagonism toward counsel for the defendant in constantly raising these objections to the letters to the May Company and the evidence of its employees and as counsel for defendant was repeatedly overruled in his objections and motions the jury was apparently impressed and swayed with the evidence which was sought to be excluded. Confusion was then created in the minds of the jurors as to the purpose of these letters when the Court in his instructions declared that these letters to the May Company were introduced for the purpose of showing malice. This instruction is directly contrary to the arguments of counsel for plaintiff in offering the evidence and the statements of the Court in admitting the same and how the jurors or anyone else could properly determine upon which theory the letters were admitted, is difficult to understand. Unquestionably the jurors were more impressed with the statements made by the Court in response to the arguments of counsel at the time objections to the evidence were introduced than to the short statement concerning their admissibility in the charge of the Court and that the jury did take into consideration the letters to the May Company and the evidence of its two employees in determining the amount of general damages is very evident from the verdict. A verdict of \$11,000.00 general damages [Tr. 220] as the result of one letter of June 2, 1931, is not only absolutely unsupported by the evidence in this case, but staggers the mind and is convincing proof that the errors of the Court admitting the letters to the May Company and the evidence of its two employees were most prejudicial to the defendant.

In *Haub v. Friermuth*, 1 Cal. App. 566, after stating that the words constituting the slander or libel must be set out in the complaint so that the defendant may have notice of the particular charge which he is required to answer, the Court states:

“The rule is of long standing that to authorize a recovery in such action the plaintiff must prove the utterance of the words set forth in his complaint, or enough of them to show that the defendant charged him with the particular offense constituting the slander. . . . *The plaintiff is not entitled to a recovery upon proof of words not set forth in his complaint, or upon a failure to prove the slanderous words which he has alleged.* It is unavailing that the evidence is such as would authorize a jury to find that the defendant intended to charge the plaintiff with the crime; *their function is to determine whether he spoke the words alleged in the complaint.* (Citing cases.)” (Italics ours.)

In *Des Grandes v. Crall*, 27 Cal. App. 313, a Demurrer to the complaint was sustained for the reason that the words of the alleged libelous document were not set out in the complaint but only the effect of such words was pleaded. This was held to constitute an insufficient pleading as the specific words constituting the libel must be set out in the complaint.

In *Stern v. Lowenthal*, 77 Cal. 340, witnesses for the plaintiff testified to utterances of the defendant other than those specifically alleged in the complaint. Motions of defendant to strike the same were denied. Upon appeal the Supreme Court of California reversed the case upon the ground that evidence is inadmissible on behalf of the

plaintiff of utterances by the defendant other than those alleged in the complaint and refusal to strike out this evidence upon motion of the defendant was error. This case, it is urged by the Appellant, is conclusive upon the question of the admissibility of the letters and the evidence of the employees of the May Company.

In *Bird v. Huber*, 179 Cal. 245, defendant was charged with libel for writing and causing the delivery of several *specific* letters to as many different persons. All of these letters were defamatory in character and were found by the Court to have been written and published by the defendant. However, the Court permitted the plaintiff to introduce *another letter* to which no reference was made in the complaint, the reason assigned for its admission and proof of its delivery being not to show malice, but "for the purpose of showing a course of conduct on the part of the defendant." The Supreme Court of California tersely disposes of the point by declaring "*that the ruling was error admits of no question.*" and the case was reversed. The Syllabus of the case states:

"Libel—Evidence—Erroneous Admission of Letters.—In an action for damages for libel based upon certain alleged false and defamatory statements contained in letters referred to in the complaint, in which action the evidence was conflicting, it was prejudicial error to admit in evidence on the offer of the plaintiff a letter defamatory of the plaintiff to which no reference was made in the complaint, it being admitted not to show malice, but a course of conduct on the part of the defendant."

In *Collyer v. Postum Cereal Co.*, 134 N. Y. S. 847; 150 App. Div. 169; the complaint alleged that the libelous

article was published in the "County and State of New York." The plaintiff was permitted, over objection and exception, to prove the separate publication of the article in a large number of papers throughout the State of New York, the manner of publication and certification of the newspapers, to show the extent of the injury. This was claimed as one ground of reversal. The judgment for plaintiff was reversed, one of the grounds being that such evidence was improper for the purpose of showing the extent of injury. After reviewing the English and New York authorities Mr. Justice Miller concludes, at page 853:

"I think the fair ruling and the one to be adduced from the cases, is that evidence of publications which might be the subject of other actions should not be received for the sole purpose of enhancing damages."

In *Beshiers v. Allen*, 46 Okla. 331; 148 Pac. 141; the trial Court refused to instruct the jury that the representation of the scandalous words to other persons before and after the action was commenced cannot be considered in determining the plaintiff's damage, if any, because plaintiff did not allege such as a cause of damage or that the plaintiff was damaged thereby. On appeal the Supreme Court of Oklahoma stated that this refusal to so instruct the jury constituted reversible error for although the evidence might be proper to show malice it was not proper to show damages, the Court stating:

“However, that (malice) was the only purpose for which such evidence was admissible, and it could not be considered by the jury for the purpose of enhancing damages.”

and finding that this refusal of the trial Court constituted prejudicial and reversible error, the Court states:

“It does not require argument to show that the repetition of a scandalous charge to three or four people is more likely to increase the verdict than words spoken to a single person.”

In *Greenleaf on Evidence*, 16th Ed., Vol. 2, p. 392, Sec. 418, after stating other language of a defendant about a plaintiff, may be given to show ill will, this authority states:

“But if such collateral evidence consists of matter actionable in itself, the jury must be cautioned not to increase the damages on that account.”

See also *Pignatelli v. Press Pub. Co.*, 189 N. Y. S. 524; 197 App. Div. 275;

Frazier v. McCloskey, 60 N. Y. 337.

The complaint at bar did not set forth the specific letters to the May Company as required by the California cases and did not give notice to the defendant that it was required to answer letters other than the one sent to Young's Market Co. Each of the other letters introduced into evidence by the plaintiff could well be the subject matter of another suit against the defendant. To

permit these letters to be introduced to show the extent of the damages in this action and still leave the plaintiff in the situation whereby she could file independent actions for damages upon each of them would be to permit her several recoveries for the same letters. This is clearly not the law. It is true of course that the Court instructed the jury, at defendant's request, that these particular letters were not to be considered in connection with ascertaining the damages suffered by plaintiff, if any, but for the purpose of showing malice. However, this is directly contradictory to the many remarks of the Court in the presence of the jury upon the objection of counsel for defendant to the introduction of these letters, that the same were admitted for the purpose of showing the extent of plaintiff's damage. It must be readily conceded that the jury was much more impressed with the remarks of the Court with reference to the admissibility of these letters at the time these letters were being admitted, and the remarks of counsel for the plaintiff at the same time with respect to the purpose for which the letters were admitted, than by the single short reference in the instruction. Under the pleadings and under the law none of the letters of the May Company nor any of the evidence of its employees was admissible for the purpose of showing damages, over the defendant's objections and exceptions, and the rulings of the Court upon all of these letters and this evidence are clearly prejudicial errors.

4. **The Court Erred in Admitting Into Evidence for the Purpose of Showing Damages, and Over Defendant's Objections and Exceptions, Letters From Defendant Addressed to Young's Market Co., Dated September 16, 1931, October 1, 1931, and October 16, 1931, as They Were All Written Subsequent to the Letter of June 2, 1931, Upon Which This Action Is Based, and They Are Not Specified in the Complaint.**

Assignments of Error 36, 37 and 38 [Tr. 278-9] are covered by the above point and as the same ruling will apply to each letter these assignments are here grouped together.

Plaintiff's claim for damages arises upon one letter dated June 2, 1931, [Paragraph IX Comp'l.; Tr. 8]. The complaint does not specify or allege the sending of any of the above dated letters. Even if it did they are clearly business letters and privileged communications and cannot serve as the basis for a libel action. Timely objections were made to the introduction of each on the grounds that they were "irrelevant, incompetent, immaterial and inadmissible under the pleadings" [Tr. 178] and each objection was overruled and an exception taken. The question as to the admissibility of letters other than the one of June 2, 1931, has been heretofore discussed. All that has been said concerning them applies here. In fact, there is even greater reason for saying that those dated subsequent to June 2, 1931, are inadmissible and irrelevant than that those dated prior thereto are in-

admissible and irrelevant as they are *ex post facto* and subsequent correspondence cannot enlarge or have any bearing upon the effect of the letter of June 2, 1931. There can be no doubt but that the errors of the Court in admitting these letters were prejudicial and effected the jury in its determining the damages. (See *Frazier v. McCloskey*, 60 N. Y. 337.)

5. The Court Erred in Admitting the Evidence of Mr. Waddington, an Employee of Young's Market Co., in Answer to a Hypothetical Question and Denying Defendant's Motion to Strike the Same for the Reason That There Was No Proper Foundation for the Question and Called for a Purely Speculative Answer.

Assignments of Error 39 and 40 [Tr. 280-1] are covered by the above point. The first Assignment of Error is to the admission of the evidence, and the second is to the refusal to strike the same and because the same ruling will dispose of each Assignment they are here grouped.

Plaintiff called as her witness Mr. Waddington, a buyer in the household department of Young's Market Co. He was employed there from 1928 to November, 1931, [Tr. 174]. In his direct examination of this witness counsel for plaintiff propounded a hypothetical question which was followed by objection, colloquy with the Court and dissertation by the witness, to all of which defendant objected and took exception. What occurred can best be shown by quoting from the Bill of Exceptions, which we will do with the indulgence of the Court:

“Q. By Mr. Balter: As a merchandising man with experience over 40 years, I think you said, Mr. Waddington, and with your knowledge of this product and with your knowledge of how it sold at Young’s in comparison with so-called well-established products, would you say that, assuming there were no threats by competitors against the product and it were allowed to develop normally, would you say that the plaintiff’s product could be expanded into a large profitable business?

Mr. Sheehan: Now, don’t answer that until I have a chance. I object to that as calling for the witness’ conclusion, also his opinion, asking for an opinion of the witness and speculative, and that there is no basis for such hypothetical question being put to this witness.

The Court: I think if the element of threats, etc., perhaps is eliminated, the witness may properly testify from a commercial standpoint as to the prospects of the probable course of such a product. I think that is entirely proper.

Mr. Sheehan: Well, your Honor, if a man like that could testify with a great degree of certainty it certainly would be a wonderful commercial instinct to have. He would be a valuable man in any business in the world if he could so predict that. I think it is so highly speculative that it is simply incompetent.

The Court: I base it on the fact that here is a witness who has been in commercial lines and in this particular line, cultivating public tastes, no doubt, for a good many years and, therefore, ought to be a judge of it.

Mr. Balter: That is true, your Honor.

The Court: With that exception, eliminating that part of it, the question will be answered.

Mr. Balter: May I consider you have asked the question, your Honor; you have reframed it better than I could, and require him to answer the question?

Mr. Sheehan: Exception.

A. Maybe I could answer it best this way: During my experience in marketing polishes of this sort I have never at any time found anything that came onto the market as quickly as this French Veneer.

Mr. Sheehan: Your Honor, I think I will have to object to that, as to this man making a dissertation on French Veneer and expounding its qualities or its sales ability or anything in connection with the Young's Market as promoting this particular product. I think it is entirely outside the issues of this lawsuit, if there are any issues in it.

The Court: Let's see; you are objecting? Was there an objection?

Mr. Sheehan: I am objecting to the witness' dissertation and explanations.

The Court: Overruled.

Mr. Sheehan: Exception.

The Court: Go on, Mr. Waddington.

Mr. Sheehan: And to his opinions.

A. (Continuing): And over, as I say, such a short period of time; and at the time we received this threatening letter our sales on French Veneer were far out-selling any other polish that we had in the house, and it just was like cutting it off with a knife; it stopped all at once as a result of this letter.

Mr. Sheehan: Now, I object to that and ask that it all be stricken out.

The Court: Motion denied.

Mr. Sheehan: The witness characterizing as to how it affected him on his business.

The Court: Further questions?

Mr. Sheehan: Exception."

What occurred is open to many criticisms. In the first place the hypothetical question is based upon the *normal development* of plaintiff's product. What constitutes normal development is unexplained. There is no showing that the witness was familiar with the ability, capacity and industry of the plaintiff, with her merchandising methods, sales organization, etc. The development of any business depends upon the ability and business acumen of the individual operating it. As we humans differ in ability, capacity, industry, etc., so do the various business enterprises in which we enter vary in their success. There is no such thing as a "normal development." What one person may consider normal development might be very phenomenal or disappointing to another. The very foundation of the hypothetical question is faulty. In the second place the witness is not qualified, irrespective of his experience as a merchandiser, to voice anything more than a mere "yes" as to whether plaintiff's product could be expanded into a large profitable business [Tr. 186]. Some of the most meritorious products have never developed into large profitable businesses because the person or organization exploiting them has not had the ability or

business acumen to develop them. Other products of less merit, because of merchandising ability, have developed large profitable businesses. Whether any product can be expanded into a "large profitable business" is a debatable question. Clearly such a question was highly improper in this case, and the irony of the situation is that though the plaintiff manufactured French Veneer since 1912 [Tr. 192] she has always made the product on the premises where she lived, except from 1920 to 1923 [Tr. 198]. Even during the days of the business boom in 1927, 8 and 9 she had not developed her business beyond a home product affair. At that time she had been making the product for about 15 to 18 years. This evidence negatives any thought that her business could ever expand into a large profitable business, so that there is absolutely no evidence before the Court which would support the hypothetical question asked. Besides the question calls for a "yes" or "no" answer. Although the defendant objected to the witness making a long dissertation over the product of the plaintiff and not confining his answer to the question, the Court overruled the objections, denied defendant's Motions to Strike the same and permitted the witness to narrate upon the qualities, sales ability and other features of the plaintiff's product. There can be no question but that the response of the witness to the hypothetical question prejudiced the jury against the defendant and effected its verdict.

6. The Court Erred in Admitting Evidence of Winifred M. Jacobs and Which Was Clearly Incompetent.

Assignment of Error 41 [Tr. 281] is covered by the above point.

This witness, called by plaintiff, testified she had been an occasional buyer of French Veneer, that is, a long number of years elapsed between her purchases, and when she asked for it at the May Co. a few *years ago* she did not obtain it but French Polish was offered to her which at first she refused to buy but later bought when the plaintiff told her that it was the same as French Veneer and that the name had been changed [Tr. 190-91]. Defendant made timely objection to the introduction of this evidence which was overruled and to which exception was taken. Counsel for the plaintiff declared that the purpose of the testimony "was to show sales resistance by the public to plaintiff's new product 'French Polish' and that this could go to the question of damages that the plaintiff sustained because of the libelous actions of defendant and should be considered by the jury in assessing actual and punitive damages." [Tr. 191].

For many reasons it was error to admit this evidence. One buying a product at intervals of a number of years is not qualified to give an expert opinion as to public sales resistance. What may have been resistance to her as an individual might have been inducement to others. Public sales resistance is a matter of expert opinion, not one of

lay opinion. Certainly this witness was not qualified as an expert. Further, the letter from which damages are claimed was sent to Young's Market Co., whereas this witness claims to have tried to purchase the product at the May Company. In light of the pleadings and the many objections that were made to the introduction of the evidence concerning the relationship between the plaintiff and the May Company, it is very clear that all of the evidence of this witness was incompetent, irrelevant and that the effect of it was to further prejudice the jury against the defendant.

7. The Court Erred in Admitting the Evidence of the Plaintiff, Over Defendant's Objection and Exception, That Her Business Fell Off to Almost Nothing After 1929 When the First Letter Was Sent to the May Company, for the Reason That This Evidence Was Clearly Incompetent Under the Pleadings.

Assignment of Error 42 [Tr. 282] is covered by this point.

Plaintiff, on her direct examination over defendant's objection that this evidence was irrelevant, incompetent and immaterial under the pleadings, testified that after 1929, when the first letter was written to the May Company, her business fell off to almost nothing. [Tr. 196-7.] The letter to which plaintiff referred is undoubtedly Plaintiff's Exhibit 2, dated March 27, 1929, addressed to the May Company. [Tr. 139.] In view of the allegation of the complaint that the only damages sought to be re-

covered flow from the letter of June 2, 1931, and from the previous citations of authority holding that the specific letters and the language thereof claimed as libelous must be set forth in the pleadings as otherwise they are not admissible as evidence to show damages or a course of conduct on the part of the defendant, it is impossible to see how this evidence of the plaintiff is either competent or relevant or has any effect or bearing upon this case except to further prejudice the jury against the defendant. The 1929 letter referred to by plaintiff was more than two years before and was to an entirely different concern than the one for which damages are claimed. Plaintiff took advantage of this opportunity to work upon the sympathies of the jury by saying that because of the 1929 letter her business fell off to almost nothing, leaving the inference that solely because of this letter all of her business in all of the cities in which she transacted business, as she later testified, completely fell off. Although she later testified that she traveled all over and had customers all over Southern California [Tr 198], that when she went to these customers in 1929 and later they would say, "I can't buy" and she quit traveling because her sales were poor, and she admitted that she knew something about the fact that there had been a depression and that all business materially dropped off, she, nevertheless, blames the alleged collapse of her business to the sending of this letter in 1929. That this examination was clearly incompetent should admit of no doubt and that it materially affected and prejudiced the jury is very clear.

V.

THE DISTRICT COURT ERRED PREJUDICIALLY IN PERMITTING THE PLAINTIFF, AND OVER DEFENDANT'S OBJECTION AND EXCEPTION, TO AMEND HER COMPLAINT DURING THE TRIAL AS TO TWO JURISDICTIONAL ELEMENTS, TO-WIT: (1) THAT THE LETTER OF JUNE 2, 1931, WAS OF AND CONCERNING THE PLAINTIFF, AND (2) THAT DEFENDANT WAS DOING BUSINESS IN THE STATE OF CALIFORNIA.

Assignments of Error 10 [Tr. 264] and 44 [Tr. 282] are covered by the above point.

When the case was called for trial and before the witness was sworn, defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which the Court refused to consider, and after the first witness was sworn, took the stand, and before she testified, defendant objected to the introduction of any evidence upon the same grounds. These objections were overruled. These motions and objections were proper under the California procedure. (*Reed v. Thomas*, 99 Cal. App. 719; *Whittaker v. McCalla*, 127 Cal. App. 583; *Taylor v. Lewis*, 132 Cal. App. 381, and other cases cited, *supra*.) Defendant contended the complaint defective, among other things in that it did not allege jurisdictional facts nor that the letter set forth was of or concerning the plaintiff. she not being mentioned or referred to in the letter. Though the Court stated he un-

derstood counsel for the plaintiff suggested that he would amend respecting the matter of the defendant doing business in California [Tr. 130] there is nothing in the record to show that any such suggestion had been made nor, in fact, had one been made. Even counsel for plaintiff stated he did not believe such amendment necessary [Tr. 130] so it appears the trial Court suggested to the plaintiff that she amend and then permitted the amendment, over defendant's objection, at a time when the defendant had urged both by Motions to Dismiss and objections to the introduction of any evidence, that the complaint was fatally defective without such allegation.

St. Claire v. Cox, 106 U. S. 353; 26 L. Ed. 222;

Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235;
C. C. Penn.;

Hurley v. Wells-Newton Nat. Corp., 49 Fed. (2nd)
914; D. C. Conn.;

U. S. Asphalt Co. v. Compoir, etc., 151 N. Y. S.
604.

After the close of plaintiff's case defendant argued for a nonsuit. In the course of and interrupting this argument plaintiff moved for and obtained, over defendant's objection, an order amending the complaint to the effect that the letter was intended to refer to the plaintiff [Tr. 201]. Without this allegation the complaint was fatally defective.

DeWitt v. Wright, 57 Cal. 576;

Des Grandes v. Crall, 27 Cal. App. 313;

Vedovi v. Watson & Taylor, 104 Cal. App. 80.

In fact, in light of the decision in *DeWitt v. Wright*, 57 Cal. 576, *supra*, the complaint is still defective in that it does not allege that Young's Market Co., *knew* that the letter referred to was of and concerning the plaintiff.

Appellant recognizes that a trial court has a wide discretion in admitting amendments to pleadings but urges that in this instance the trial Court abused that discretion in (1) suggesting to counsel for plaintiff one amendment and then permitting the amendment to be made, and (2) permitting another amendment to be made after the plaintiff's case was closed, in view of the fact that the defendant relied upon the pleadings of the plaintiff and made the necessary and purported motions and objections at the proper time. A defendant is entitled to rely upon the status of the pleadings of a plaintiff, and the plaintiff should be bound by his pleadings within reasonable limitations.

VI.

**THE DISTRICT COURT PREJUDICIALLY
ERRED IN CHARGING COUNSEL FOR
DEFENDANT WITH DILATORY AND UN-
ETHICAL TACTICS AND IN CHASTISING
HIM IN THE PRESENCE OF THE JURY.**

Assignments of Error No 23 [Tr. 273] and No. 35 [Tr. 277] are covered in the above point.

The trial Court, during the trial, interjected several remarks in the presence of the jury which could have no other effect than to prejudice it against defendant and its counsel. By the constant overruling of defendant's numerous objections to offered testimony, and which were made in good faith and great merit, the constant sustaining of the plaintiff's position on all matters, and actually suggesting amendments and objections for plaintiff's benefit, and aiding plaintiff's counsel in the examination of plaintiff, the Court placed the defendant in a very unfavorable light to the jury. With the jury in this frame of mind the Court on at least two other occasions further prejudiced the jury against defendant and its counsel by his impartial and improper arguments with counsel for defendant. These two particular occasions were:

(a) After plaintiff had introduced, over defendant's strenuous objection and exception, her Exhibits 1 to 8 inclusive which included all of the letters of the May Company, counsel for plaintiff was interrogating a witness from the May Company as to what it did when it received

these letters. Defendant objected to such evidence and moved to have it stricken on the ground that these events all occurred prior to the letter of June 2, 1931 [Tr. 156]. Counsel for plaintiff justified the evidence as being properly admissible to show the measure of plaintiff's damage and contended the jury could consider the loss of business at the May Company in assessing plaintiff's damages [Tr. 156-7]. After examining the pleadings the Court said [Tr. 160]:

“In the absence of a specific objection heretofore made as to what was included, or an analysis of this complaint, I would feel compelled to say that the basis of damage may reasonably be held to include all of the previous letters. Undoubtedly, I think, that was the intention.” Exception to the statement was taken. This is assigned as prejudicial error because:

1. The allegation of the complaint seeking damages is definite and needs no explanation. [Par. IX; Tr. 8.] It asks damages for sending one letter. [Tr. 8.] Defendant was entitled to rely upon that allegation. Objections to other letters offered to show damages were proper and should have been sustained, not only because damages from them were not asked but also because they were not specifically alleged and set forth.

Haub v. Friermuth, 1 Cal. App. 566;

Stern v. Lowenthal, 77 Cal. 340;

Bird v. Huber, 179 Cal. 245.

2. There is no duty on the part of defendant to make “a specific objection” as to what was included in the complaint or for an analysis of it [Tr. 16] and defendant is entitled to rely upon the plaintiff’s pleadings and the plaintiff is not entitled to go beyond them. The Court clearly insinuates there is such a duty on the part of a defendant and leaves the inference that defendant, by not making such prior objection, is now trying to take an unconscionable and unfair advantage.
3. A specific objection was made out of the presence of the jury as to what was included in the complaint and an analysis of it was sought at the commencement of the trial and before any witnesses were sworn, but which the Court refused to entertain because it was “untimely”. [Tr. 127.] Such proceedings were entirely proper under the California procedure. The Court now leaves the thought with the jury that no such objection was made. This is not only misleading and not impartial comment but prejudicial misconduct.

(b) The plaintiff did not produce the original of the letter of June 2, 1931. Instead she produced what purported to be a copy thereof and which was identified by her son, a disbarred attorney. [Tr. 131.] Defendant properly objected and was overruled. [Tr. 134.] Because of these objections the Court directed counsel for defendant to take the witness stand and he testified:

“I do not know of my own knowledge that the defendant in this action did not have a carbon copy or any copy of the original letter except that I asked for it and I have the note in my file in which I think

I requested it. They say they have not got it. This is the best of my knowledge. I have no officer here to testify that the copy is not in existence." [Tr. 134.]

Later in the trial when the buyer in the household department of Young's Market Co. was on the stand and was shown the copy of letter in question and asked if the letter was received by him at Young's Market when he was there, the following occurred:

"Mr. Sheehan: Your Honor, I wish to object to that question on the ground that it calls for *the conclusion* of the witness and that it is *inadmissible under the pleadings*. *There is no allegation in the complaint whatsoever that the letter was ever received by the Young's Market.*

The Court: Let me have the complaint.

Mr. Balter: We allege it was written to them, Your Honor. It is presumed a letter written is received.

The Court: The allegation is that the defendant published and caused to be published a letter addressed to Young's Market Company, which letter reads as follows:

Mr. Balter: A presumption of law arises that the letter was received in due course.

The Court: Wait a moment, please.

A. As near as I can recall, this—

The Court: Just a minute.

The Witness: Pardon me.

The Court: Now, I want to call counsel's attention to the denial of that appearing on page 3 of the answer. '(b) That it denies that at any time, or at all, in furtherance of the plan and/or scheme to in-

jure plaintiff's good name and/or reputation, it wrote or caused to be written and/or mailed the letter set forth in said paragraph VI'. Do you think that is a denial, sir?

Mr. Sheehan: Well, I would say it would be a denial in the terms of the allegations of the complaint. The allegations of the complaint, of course, Your Honor, will see, are so framed that it would be very difficult to deny them categorically in any way.

The Court: I am not talking about that feature of it. I have just read to you the allegation of the complaint. Now you know that that is not a denial, don't you; that for the purpose of injuring the plaintiff, that is merely a denial that you wrote the letter for the purpose of injuring the plaintiff, but is an admission that you wrote the letter.

Mr. Sheehan: Well, Your Honor, I do not believe I am in any position to deny that this letter was written. Frankly, I do not really know.

Mr. Balter: You said that yesterday, Mr. Sheehan.

The Court: That is just exactly what I wanted. Your position, then, is that you will observe the rule that certainly prevails in this Court and in all business or trials of cases that involve business, and when there is an open and evident fact that you will not deny it. This Court and trial has been delayed since the beginning by technical—and I will not describe them otherwise—questioning as to whether this letter was written. Yesterday I had not examined the pleadings but here is a direct admission—not a direct admission, but a failure to deny, I take it. Now, if this letter was written let us have that admitted, and I do not want to hear any more of it during this trial. Proceed.

Mr. Sheehan: May I explain myself, Your Honor.

The Court: Yes, sir, you may, but don't make it too long now.

Mr. Sheehan: Well, it has never been my position that I denied this letter, never has. I did not draw that answer. Other counsel drew it and I understood the answer did admit it.

The Court: Do not trouble the Court with that. It is the defendant's answer and you do not need to introduce such suggestions.

Mr. Sheehan: The only thing, Your Honor, that I might state is that I did not have the copy of it and the original was not produced. I do not know what that means, but as to my own knowledge about anything, I have none, and I do not deny that what apparently seems to be an obvious composition of this defendant.

The Court: I will remember that you made the statement yesterday of your own knowledge that the company did not have a copy of that letter.

Mr. Sheehan: Your Honor, that I did not have it.

The Court: The Court certainly took that as a denial that the letter had been written and your whole conduct was a denial that the letter had been written.

Mr. Sheehan: I am sorry, Your Honor, if I have created that impression. I did not have a copy of the letter.

The Court: All right.

Mr. Sheehan: When they did not produce the original I thought it was at least something as to the inquiry.

The Court: Proceed.

Q. By Mr. Balter: When you received this letter was it shown to you by Mr. Young?

A. Yes.

Q. And you read it didn't you?

A. I read it.

Q. And you acted upon it?

A. Jointly.

Mr. Sheehan: Just at this point, Your Honor, I wish to—and I think I have got to do it in protection of my client's rights—I wish to take exception to Your Honor's remarks in the presence of the jury on that subject.

The Court: Very well." [Tr. 175-6-7-8.]

Counsel for defendant is first put through the unusual procedure of being called as a witness by the Court. This is sufficient to cause the jury to feel that something was wrong and to prejudice it against defendant and its counsel. He is then accused of having stated in his testimony that the letter in question had not been written, when this obviously was not his testimony. He is then accused of dilatory and unethical tactics because he objected to the introduction of a purported copy of an original letter, when by the answer of defendant this objection was entirely permissible and proper. The answer in paragraph VI (b) [Tr. 30] denied the letter was written in furtherance of a scheme to injure the plaintiff, and in paragraph (c), admitted that in June of 1931, defendant wrote, without malice, a letter concerning the infringement of its trade-mark "Liquid Veneer" but denied on information and belief that the letter set forth in paragraph VI of plaintiff's complaint was "the said letter or any letter written and/or mailed by it". The Court did not allude to nor read over said paragraph (c) and which

is just as much a part of the answer as paragraph (b). This left the implication that there was no denial whatsoever of writing the letter in question and that counsel was therefore delaying and impeding the trial by raising untenable objections. His objections were both proper and upon meritorious legal grounds for when paragraphs (b) and (c) are construed together they deny that the letter set forth was sent, but if sent it was not in furtherance of any alleged scheme to injure the plaintiff. Counsel was justified in making his objections to a copy identified only by the son of the plaintiff, who was her attorney when the suit was filed and who was thereafter disbarred from the practice of law, under these allegations of the answer. The Court further indicates that he even caught counsel admitting the lack of merit in his objections by saying, *"That is just exactly what I wanted. Your position then is that you will observe the rule that certainly prevails in this Court and in all business or trials of cases that involve business and when there is an open and evident fact that you will not deny it."* [Tr. 176.] Even if the trial Court did feel the objections to be without merit the occasion did not justify the disparaging remarks that were made in the presence of the jury. In and of themselves these remarks constitute prejudicial error, and combined with the other errors of which appellant complains they clearly constitute reversible error.

VII.

THE DISTRICT COURT ERRED IN HIS
CHARGE TO THE JURY.

Assignments of Error 45 to 52 inclusive [Tr. 277-286] are covered by the above point. For brevity and convenience the errors will be grouped for discussion.

1. Assignments of Error 45 and 46 [Tr. 283]. After giving the jury the California definition of a libel, stating that it must have two qualities; be, (1) false, and (2) unprivileged, and that the jurors knew what was meant by the word "false", he sought to explain what was meant by the quality of being "unprivileged". He stated [Tr. 213]:

"Under the law an *unprivileged communication*, as applied to this case, is a *communication made without malice.*"

At the close of the Court's charging defendant's counsel excepted to the above by stating [Tr. 218]:

"Mr. Sheehan: Your Honor, I believe Your Honor misspoke when you first addressed the jury and you said 'unprivileged' when Your Honor really meant 'privileged'. In your definition of the privileged communication, that it is a communication by one person having an interest in the matter to another person having a like interest, that is, between two business houses, and I think Your Honor misspoke on that."

and the Court responded:

"I read the section. That ought to be good enough."

That the Court misspoke and consequently erred appears on the face of the charge (Sec. 47 Civil Code of California, *supra*). The Court failed to correct his error after counsel had directed his attention to it by refusing to redefine a privileged communication and by stating he had read a section and that that ought to be good enough. This left the jury with a confused conception as to what constituted a privileged communication or an unprivileged one. It also received the impression that defendant's counsel took exception to a Code definition of the word involved. Taken in conjunction with other Assignments of Error, it is submitted that this error is substantial.

2. Assignment of Error 47 [Tr. 283]. Immediately following the above erroneous and confusing definition of "an unprivileged communication" the Court charged [Tr. 213]:

"If malice exists then privilege cannot be claimed. 'To a person interested therein,' that is, interested in the communication. It might reasonably be said that the Young Company or The May Company—the Young Company this letter was addressed to, I believe,—was interested in the subject. 'By one who is also interested.' That would be the Liquid Veneer Corporation. 'Or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent or was requested by the person interested to give the information.' In other words, if this were a legitimate trade *necessity*, a legitimate

communication from one business house to another and written in good faith and *everything true* in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good faith, *though it be true*, it is not privileged *If it is false, though it otherwise agrees with the definition of 'privilege', it is not privileged.*"

Defendant excepted to this charge, stating [Tr. 219]:

"I then wish to except to that part of Your Honor's charge in which you stated that in a privileged communication that if the matters were false, that that could be charged against the defendant; and I ask Your Honor to charge that if the communication is privileged that even though the matters were false or uttered under a mistaken belief that the communication still remains privileged."

The Court replied:

"Yes, you may take that instruction. I think that is correct. However, I emphasized or intended to emphasize, that true or false, it must be done in good faith. Very well."

Appellant contends the Court did not correct his error in this instruction by merely stating, "Yes, you may take that instruction". The charge is obviously erroneous for, first, it requires a privileged communication to be "a legitimate trade necessity" with "everything true in it", then leaves the impression that even though "true", if not made in good faith, is libelous, and winds up by saying that if false "though it otherwise agrees with the definition of

‘privilege’ it is ‘unprivileged’.” This unquestionably left the impression with the jury that privilege exists only when the matters contained in the writing are *true* and that it must also be a trade necessity. This part of the charge is directly contrary to the law.

By Section 45 of the Civil Code of California, libel must be both “false and unprivileged”. Therefore, if privileged falsity is immaterial. In *Snively v. Record Publishing Co.*, 185 Cal. 565, one of the principal grounds for reversal of the judgment against defendant was because the trial Court “instructed the jury to the effect that it was for it to determine the meaning and effect of the cartoon and that if it was reasonably susceptible of conveying to the ordinary person the meaning that the plaintiff was dishonest or that he was guilty of accepting a bribe or was ready to accept a bribe, then the publication was unprivileged and the plaintiff was entitled to recover compensatory damages”, the Court assuming “there could be no privilege unless the charge made by the cartoon in the sense above stated was true and that it was incumbent upon defendants to prove such truth”. The Supreme Court stated, at 579:

“Our conclusion in regard to this point demonstrates that the Court erred in this instruction and for this reason it is necessary to reverse the judgment.”

At page 574 the Court considered the proposition as to whether an article was unprivileged though the matters therein contained were false in holding that an article that is false may nevertheless be privileged, the Court states:

“The proposition that one is not liable for damage if, without malice, he states something to another which under the circumstances he is lawfully authorized to tell him, necessarily implies that the statement made may not be accurate; that is to say, that it may be untrue, but that under such circumstances the plaintiff cannot recover damages.”

Further citations of authorities upon this plain proposition seem unnecessary. After thus erroneously emphasizing that falsity prevented a communication from being privileged, did the Court correct itself upon defendant's exception by stating, “you may take that instruction” [Tr. 219]? Appellant contends not. The Court emphasized the necessity for the truth of the matters in the communication on three occasions. This made a deep impression upon the jury. They were convinced that the truth of the letters was the only defense defendant could have for if not true they were not under any circumstances privileged. Since no evidence as to their truth was presented the jury, under the circumstances, logically returned a verdict for the plaintiff. Since counsel for defendant had been overruled on virtually every other objection and exception, had been accused of delaying the proceedings and had been chastised in the presence of the jury, it is very unlikely the jury paid any attention to his exception to the charge of the Court and request for a correct charge. The means taken by the Court to correct the error did not cure the harm that was done. The Court should have carefully and fully advised the jury that his previous rulings as to

the admission of these letters for the purpose of showing damages were erroneous and that the only purpose for which the letters could be considered was to show malice. Taken in conjunction with the other errors asserted, the attitude of the jury toward appellant's counsel, the unfavorable light in which appellant was placed by the constant overruling of its objections, it is clear that the error of the Court in giving this instruction was prejudicial.

3. Assignment of Error 48 [Tr. 284]. The Court then further charged the jury as follows [Tr. 214]:

"Now, gentlemen, consider seriously whether those statements are true. You are at liberty to and should contrast that with the statement of the witnesses here that the telephone of this woman was in the telephone directory throughout the time. I think the representative of the Young store said he had never any difficulty—in fact, both witnesses stated they had never had any difficulty in finding her. And you will thereupon conclude whether that is a true statement."

Defendant excepted to this charge, stating [Tr. 219]:

"I then wish to except to that part of your Honor's charge in which you stated that in a privileged communication that if the matters were false, that that could be charged against the defendant; and I ask your Honor to charge that if the communication is privileged that even though the matters were false or uttered under a mistaken belief that the communication still remains privileged."

The Court replied:

“Yes, you may take that instruction, I think that is correct.”

This part of the charge left the jury with the understanding that the only question for its consideration was whether the statements contained in the letters were true or false. If the Court had decided as a matter of law that the letter in question was an “unprivileged communication” and therefore the sole question was its truth or falsity, perhaps the charge referred to would not be subject to serious question. However, the Court apparently submitted to the jury the question as to the privileged character of the letter. This, Appellant contends, was erroneous. In any event, before having done so, the Court should have carefully and clearly brought home to the jury that the falsity of a communication which was privileged did not make the sender thereof liable for any damages resulting therefrom because a privileged communication necessarily implies that the statements made may not be accurate. He then should also have distinctly and fully submitted the question of, if the communication were privileged, was there such proof of actual malice as to destroy the privileged character of the communication. Instead of carefully analyzing these situations for the jury, confusing instructions as to both the character of the letter and the effect of the truth or falsity thereof were given. It was only natural for the jury to err under such confusing circumstances and Appellant respectfully urges that the error complained of was prejudicial to it.

VIII.

**THE DISTRICT COURT ERRED IN REFUSING
TO GIVE AN INSTRUCTION PROPOSED
BY THE DEFENDANT.**

Assignment of Error 51 [Tr. 285] is covered by this point.

Defendant requested the Court to instruct the jury (Proposed instruction No. IV; Tr. 210):

“As a matter of law, communications relied on by plaintiff in this action are privileged communications and that, therefore, plaintiff cannot recover unless she proves by a preponderance of the evidence that said publication or publications even though false were sent out by the defendant with malicious intent. Malice is a desire and disposition to injure another founded upon spite or ill will. Therefore, if you should find that the alleged publications even though false were not founded upon enmity to the plaintiff but were made with the sole desire on defendant’s part to protect its own interests, then your verdict must be for the defendant.”

Upon refusal of the Court to so instruct the defendant took exception by stating [Tr. 219]:

“I wish to except to your Honor’s failure to give each instruction submitted by defendant.”

The trial Court erred in refusing to give the requested instruction for the reasons that where the essential facts are not disputed in a libel action, the question as to whether the communication in question is privileged is

solely one of law for the determination of the trial Court. In *Jones v. Express Pub. Co.*, 87 Cal. App. 246, wherein a judgment of non-suit was rendered at the close of the plaintiff's case and in which the question of whether the alleged libelous article was privileged was one of the points at issue, the Court, at 256, states:

“When essential facts are not disputed, the question as to whether the communication is privileged, is solely a question of law for the determination of the judge. (Newell on Libel, 382 sec. 345-347; Gatley on Libel, 280-284, 650; Dauphiny v. Buhne, 153 Cal. 757 (126 Am. St. Rep. 136, 96 Pac. 880).) ‘It is exclusively for the judge to determine whether the occasion on which the alleged defamatory statement was made, was such as to render the communication a privileged one . . . If, taken in connection with admitted facts, the words complained of are such as must have been used honestly and in good faith by the defendant, the judge may withdraw the case from the jury . . .’ (Newell on Libel, 383, sec. 345.) And when the facts clearly constitute a privileged communication even though the language employed under other circumstances might be slanderous per se, the very privilege creates a presumption that the communication is used innocently and without malice. (Newell on Libel, 381, sec. 342; Jones on Evidence, 3d ed., 34, sec. 29.)

See, also, upon the above point:

Locke v. Mitchell, 84 Cal. App. Dec. 336 (Jan. 30, 1936).

As there is no dispute concerning the essential facts in this case, the evidence consisting, so far as the alleged libel is concerned, of letters concerning the defendant's right to exclusive use of the words "Liquid Veneer", its trade-mark [Tr. 205], the question of the character of the letter of June 2nd was one for the determination of the trial Court. Instead of deciding this question of law, the Court submitted the question to the jury under very confusing instructions which have heretofore been discussed. There can be little doubt as a matter of law that the communication in question passes every test for a privileged communication, it being a business communication from one interested business concern to another. The only question therefore of moment is, "was it free from malice?" That question the defendant was willing to submit to the jury under a proper instruction. The definition submitted in the above proposed instruction fits exactly the definition given by the Supreme Court of California when construing "malice" as used in Section 47 of the Civil Code; that Court, in *Snively v. Record Publishing Co.*, 185 Cal. 565, at 576, states:

"The word 'malice' in the provisions of the Civil Code upon the subject of libel and slander means actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as 'a wrongful act done intentionally without just cause or excuse,' or as 'the absence of legal excuse.' "

and at 577:

“Actual malice was there defined as ‘a state of mind arising from hatred or illwill, evidencing a willingness to vex, annoy or injure another person’, and ‘. . . the motive and willingness to vex, harass, annoy or injure.’ ”

The trial Court did state in his charge that the jury may consider the letters other than the one specially pleaded to show malice and that “if they show or tend to show a continual desire or intention on the part of the defendant to injure the plaintiff, then you may consider them” [Tr. 217]. The jury had, however, already received the impression that these very letters were admitted for the purpose of showing damages. By stating the above the Court failed to correct the impression which the jury had already received, and the Court further neglected to define malice as completely as it should have been defined. Malice in a libel suit must be actual and must evidence a “state of mind arising from hatred or illwill.” Defendant was entitled to a full and complete definition of the term. Such was not given, whereas it was proposed in the refused instruction and it is submitted the Court erred in refusing to give this instruction.

IX.

THE VERDICT OF THE JURY, IN AWARDING THE PLAINTIFF \$11,000.00 COMPENSATORY DAMAGES, IS NOT SUPPORTED BY THE EVIDENCE BUT IS SO LARGE THAT IT INDICATES THE JURY DISREGARDED THE EVIDENCE AND WAS ACTUATED BY PASSION AND PREJUDICE.

Assignments of Error 53 and 56 [Tr. 286 and 287] are covered by the above point.

At the close of plaintiff's case defendant made a motion for non-suit on the grounds that plaintiff had failed to establish any cause of action whatsoever against defendant and that the plaintiff fails to allege a cause of action [Tr. 200]. This motion was taken under submission by the Court [Tr. 202]. The defendant then placed a witness on the stand. At the close of all of the evidence and of the entire case, counsel for defendant renewed his motion to dismiss upon all of the grounds stated in his original motion and on the additional ground that there was nothing before the Court, nor was there any additional evidence since his previous motion, which would entitle the plaintiff to maintain the action alleged in the complaint, or any cause of action whatsoever. This motion was denied and exception to defendant noted [Tr. 207].

The only damages sought are from the effect of the one letter written to Young's Market Co., dated June 2, 1931, [Paragraph IX of Complaint; Tr. 8]. The only proof of the effect of that letter is a discontinuance of

plaintiff's product by said Young's Market Co., from the receipt thereof before June 2, 1931 [Tr. 185], to September 16, 1931, when the witness, Waddington, was busy reorganizing another department [Tr. 189], or to about November, 1931, when he left the employ of that Company [Tr. 174 and 185]. At best this is a period of five months. There is no evidence this letter was seen by any person connected with the Company or by any other customer of the plaintiff, or any person other than the witness, who was not a personal friend of hers, and Mr. Young, an officer of the addressee company. He immediately "put the letter away in his private files" [Tr. 178] and apparently so effectually that it could not be found for use at the trial. There is no testimony that this letter exposed the plaintiff in the eyes of Mr. Waddington or Mr. Young, or any other person whomsoever, to "hatred, contempt, ridicule or obloquy" or caused her to be shunned or avoided, or injured her in her occupation (Calif. Civil Code, Sec. 47). It was not what was said concerning the plaintiff that caused Young's Market Co. to discontinue selling her product, it was the threat made in the letter to that Company, that possibly it might be made a defendant in some injunctive proceeding. On direct examination the plaintiff's counsel asked Mr. Waddington, the witness from Young's Market Co. [Tr. 185]:

"Q. By Mr. Balter: Mr. Waddington, when did you take off of the shelves of the Young's Market Company the product French Veneer?

A. I could not give you the exact date that it was taken off. It was following the receipt of this letter, the first letter introduced.

Q. The first letter that I read? And why did you take it off the shelves?

A. Because of the threat involved in the letter."

Clearly, therefore, plaintiff is only entitled at best to nominal damages for her alleged mental anguish and suffering and other intangible damages. As for her actual financial loss, it naturally would be the profit realized from the sales she would have made to Young's Market Co. during this five months' period. She neither produced any books of her own nor of Young's Market Co. to show how much those sales would have amounted to, or what her past sales to this Company were. She explained the absence of her own books by reason of "a fire in my garage some time between 1921 and now" [Tr. 194], a suspicious circumstance to say the least. She makes no explanation why the books of Young's Market Co. are not in Court to show the extent of this business, another suspicious circumstance, for the burden of proving her damages was upon her and the best evidence would have been the books of Young's Market Co. to show the extent of her sales. Section 2054, Sub. 7, of the California Code of Civil Procedure, provides:

"That, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

Looking at her own evidence we find she testified on her direct examination, she came to Los Angeles with her product in 1916 or 1917 [Tr. 193]. At first she did a gross business of \$1,000.00 a month [Tr. 194]. It cost her an average of \$400 a month to do this business [Tr. 196]. She continued to obtain her personal source of income from this product "until the year 1931. 1929 is when it dropped most and then in 1931 I had lost practically all and I had to depend upon my sons to support me." [Tr. 196.] On cross-examination she stated she never filed an income tax return [Tr. 198] and on examination by the Court she testified:

"I cannot say how much business I did in 1928 because I haven't the records. My gross business, that is the amount I was receiving altogether from my manufacture and sale of French Veneer, in the year 1928, was 'approximately between \$300 and \$400 a month, and then in 1929 it had fallen down and in 1930 to 1931 it had almost completely fallen down.' I had no other source of income. When I first came here from Portland I lived in a 12 room home with a three car garage and I manufactured my product in the garage. From 1920 to 1923 I had a store on Pico Street. In 1927, 1928, 1929 and 1930 I lived at 311 South Cloverdale, where I lived for six years. I made my product at that place in my garage. I always made my product on the premises where I was living except when I had the store on Pico Street. I did not live there. Other retail stores than Young's Market and the May Company handled my product. I traveled all over and made regular trips to all of the Southern Counties of California. I did

this 'up until the year of about 1930-1929 and 1930, and then when I would go out and these customers would say, 'I can't buy,' I just lost heart in it and I just quit because it is an expense to travel when you are not making anything."

Keeping in mind that the letter in question was sent on June 2, 1931, that she frankly admitted that in 1929 and 1930, long prior to the letter complained of, her customers said they could not buy and that she lost heart in her business and quit because of the expense of traveling without making anything, and the other circumstances above mentioned, it is plain to see that by no stretch of imagination did plaintiff suffer actual damages to the extent of \$11,000.00. That sum is more than her *gross* income for more than two years prior to 1929 when her sales were good. The verdict clearly shows passion and prejudice on the part of the jury. It also unquestionably took into consideration, in assessing these damages, all of the other letters which were admitted on the basis of showing damages and with which we have heretofore dealt. We concede that jurors are given great latitude in determining damages, but insist there must be some reasonable relationship between the amount awarded and the evidence in the case. It is the duty of the Appellate Court to curb the generosity of jurors in handling another person's money. The amount here clearly is so excessive as to require a reversal and a new trial, unless the Court dismisses the action because of lack of jurisdiction over defendant.

X.

**THE VERDICT OF THE JURY AWARDING
PLAINTIFF \$9,000.00 PUNITIVE DAMAGES
IS ENTIRELY ERRONEOUS.**

Assignments of Error Nos. 54 and 55 [Tr. 286-7] are covered by the above point.

The award of punitive damages is entirely erroneous for two reasons: (1) The complaint contains no allegations which cover or permit a verdict of punitive damages; and (2) even if the complaint be construed to permit such an award, the verdict is not supported by any evidence but indicates gross error and disregard of the evidence by the jury and that it was actuated by improper motive or by passion or prejudice against the defendant.

In order for plaintiff to recover punitive damages it is necessary that she allege and complain therefor in her complaint. In the complaint in this action the only reference to punitive damages is in the prayer thereof. As the prayer is no part of the substantive portion of the complaint we must disregard the reference to the punitive damages in such prayer. There being no other reference to punitive damages, the pleadings do not permit the making of such award.

In *Syfert v. Solomon*, 95 Cal. App. 228, at 237, the Court states:

“No recovery of exemplary damages can be had unless such damages are alleged in the complaint.”

In *Belm v. Patrick*, 109 Cal. App. 599, at 607, the Court states:

“It has also been held that in the absence of such allegations it was error to award punitive damages

though the evidence showed malice and oppression on the part of defendant. (Lorenz v. Hunt, 89 Cal. App. 8, 16.)”

In *O'Donnell v. Excelsior Amusement Co.*, 110 Cal. App. 685, the final syllabus reads:

“In such action plaintiff was not entitled to claim that the verdict, including punitive damages, should be allowed to stand where plaintiff in his complaint did not claim punitive damages nor did he allege any facts or circumstances which would have warranted the trial Court in submitting such an issue to the jury and throughout the trial of the action no such damages were claimed and the trial Court instructed the jury that ‘this is not a case for punitive or exemplary damages.’ ”

In *Taylor v. Lewis*, 132 Cal. App. 381, we read:

“Necessarily if the recovery of punitive damages is sought malice in fact must be alleged and proved. (Davis v. Hearst, *supra*; Sec. 3294 Civil Code.) Only compensatory damages are asked in the complaint here.”

Even though we assume, for the purposes of this argument only, that the allegations of the complaint are sufficient, the award is not supported by the evidence. The letters from defendant to May Company and Young's Market Co., other than the one dated June 2, 1931, were not admitted for the purpose of showing malice but to show damages [Tr. 156-60 inclusive]. This was the purpose for which the jury understood they were introduced. If we view the case in this light, and which is the light in which the trial Court did, that these letters were to

show if "the plaintiff suffered any damage, of course, and whether if she did suffer damage, that was attributable or reasonably the result of the letters," then there is not any evidence of "a state of mind arising from hatred or illwill evidencing a willingness to vex, annoy or injure another person." (*Snively v. Record Pub. Co., supra.*) The plaintiff cannot blow hot and cold at the same time. She cannot insist, as she did at the trial, that these letters were offered for the purpose of "showing the measure of damages" and "the extent of the damages," and now declare they were admitted in order to prove malice to justify the punitive award. The jury, erroneously we contend, had already awarded a large sum as general damages based upon these letters. To permit another large award on a different basis or theory but based upon these same letters would be to permit double recovery for the same act. This is not allowed under the law. Nine Thousand Dollars is a lot of money. It is more than plaintiff had taken in as gross receipts in over three years prior to the date of the letter of June 2, 1931. There was no public publication of these letters. They were retained in the private files of the two addressees and were seen only by a very few employees. There is no evidence to show plaintiff was exposed to hatred, contempt, ridicule or obloquy. There is not the slightest evidence to support an award of punitive damages. The jury obviously was actuated by sympathy for the plaintiff and prejudice against the defendant, and, it being the defendant's money, was free with it. Since we have not yet arrived at the point where wealth may be redistributed at the whim of a jury, we submit it is the duty of this Court to correct the error and wrong committed by this jury.

XI.

THE DISTRICT COURT ERRED AND ABUSED
HIS DISCRETION IN DENYING DEFEND-
ANT'S MOTION FOR NEW TRIAL.

Assignment of Error 57 [Tr. 287], is covered by the above point.

We are not unmindful of the rule that a Motion for New Trial rests in the discretion of the trial Court and ordinarily no appeal from his order may be taken; however, where the trial Court has abused his discretion in making such order, then we submit this order may be reviewed, within the rule stated in *Fairmount Glass Works v. Coal Co.*, in 287 U. S. 474, where the Court states:

“Under certain circumstances the Appellate Court may inquire into the action of trial Court on motion for new trial.”

Even though not assigned as an error on appeal to the Circuit Court the latter may inquire into the denial of the trial Court of a motion for new trial, for

“If the refusal to grant the motion for a new trial was deemed by the Circuit Court of Appeals plain reversible error, it was at liberty under its rules to notice the error although not assigned.”

This Court has a rule similar to that in the cited cases. Rule 24, Sub. 4, among other things provides,

“But the Court, at its option, may notice a plain error not assigned or specified.”

We submit therefore this Court may consider the action of the trial Court in denying the motion for new trial. This motion was based on the grounds that the Court had no jurisdiction over defendant as it was not doing business in the State of California, the service of process on the Secretary of State was ineffective, the verdict was excessive, the evidence was insufficient to justify the verdict, and upon certain errors committed by the Court at the time of the trial, and the further fact that the complaint was still defective [Tr. 220-21]. The Court abused its discretion in denying the motion for clearly defendant was not doing business in the State of California, which point has heretofore been discussed at length; and equally clearly the service of process on the Secretary of State was not effective, and which point has heretofore been discussed in this brief, so that the trial Court had no jurisdiction over the defendant. Refusal to set aside a verdict and judgment when the trial Court has no jurisdiction over a defendant constitutes, in our opinion, a clear abuse of discretion. No opinion or reasons for the denial of the motion were given. It was summarily disposed of. We submit therefore the Court erred in denying the Motion.

XII.

**THE DISTRICT COURT ERRED IN REFUSING
TO STRIKE CERTAIN AFFIDAVITS FILED
BY PLAINTIFFS AFTER THE JUDGMENT
HEREIN WAS ENTERED.**

Assignment of Error 58 [Tr. 288] is covered by the above point.

After the judgment in favor of plaintiff was entered and defendant had filed motions for new trial and dismissal, plaintiff filed several affidavits all pertaining to the method by which defendant conducted its business [Tr. 225]. They were filed to support the finding of the Court that the defendant was doing business in California at the time this suit was filed. Motion to strike same on grounds "that said affidavits were incompetent, irrelevant and immaterial" [Tr. 239] was made, overruled, and exception noted. Though the defendant takes the position that these affidavits are not in any wise or manner a proper part of the record on this appeal and are improperly on file in the lower Court and part of the Bill of Exceptions on this appeal and therefore will not receive the attention of this Court, defendant feels, in justice to the Court, that its reasons for its position on this matter should be given to this Court. The jurisdiction of a Court must be determined in the light of the evidence presented when that issue is before the Court. After the determination of that issue the decision of the Court cannot be bolstered up by further evidence from the prevailing party

after a trial on the merits has been had, judgment entered and the jury discharged. To countenance the refusal of the trial Court to strike these affidavits would be to approve of trial technique which would make litigation interminable. The defendant here could have filed further counter-affidavits in reply to those filed, the plaintiff would then have filed further rebuttal affidavits, etc., etc. The judgment of the trial Court on the question of whether defendant was doing business in California is just as final on that point so far as the prevailing party is concerned as is the verdict of the jury on the point of damages. It could not be contended that plaintiff could, after the verdict had been entered, have introduced further evidence in affidavit form, or otherwise, to substantiate and justify the verdict of the jury. The question of whether defendant was doing business in California is a mixed one of law and fact. The decision of the trial Court stands or falls upon the state of the evidence at the time he was considering that question. Having taken a certain view of that evidence, if he later feels it is insufficient to support his findings, he should re-open the case so that each party would be given an equal opportunity to present further evidence on that matter. If the Court considered the affidavits in question material the proper procedure would have been to have granted the Motion for New Trial, then both sides could have re-opened the question of jurisdiction and each would have had an opportunity to again present the evidence and the law upon this important question to the Court. We submit the affidavits are not

validly a part of the records before the trial Court nor on this appeal and should be so considered by this Appellate Court.

For fear that this Court might misconstrue the position of the defendant upon this point and feel that because opposition to the filing of these affidavits has been made, the affidavits might contain material and information which the defendant might well fear, it should be noted that defendant submits, first: proper rules of evidence and procedure should be followed and that therefore these affidavits are improperly on file and, second: the additional affidavits as filed, even if considered, do not in any wise help the plaintiff in her position. The affidavit of plaintiff's son, Isador I. Smuckler, is clearly one of hearsay and states his biased and prejudiced conclusions [Tr. 231]. The affidavit of Byron Jack Badham, Jr., [Tr. 229] contains only further and corroborating evidence as to the fact that certain of the merchandise ordered by customers of defendant was shipped from a warehouse in San Francisco, California. There has been at no time any dispute concerning this fact. The affidavits of John Brash and J. W. Howell [Tr. 225 and 235] in the final analysis amount to only statements that on certain specific dates defendant had certain merchandise in the warehouse. There has been no dispute but that merchandise from time to time was left by defendant in the warehouse. The fact that the merchandise in the warehouse was changed to the account of G. A. Hosmer Company has no bearing upon the question before the Court of whether or not the defendant was doing business in the State of California. They clearly add nothing to the record, but tend only to further encumber the record.

XIII.

**THE BILL OF EXCEPTIONS HEREIN WAS
FILED, SIGNED AND SETTLED IN THE
JUDGMENT TERM AS EXTENDED AND IS
PROPERLY BEFORE THIS COURT.**

Respondent having made motion before trial Court to strike proposed Bill of Exceptions and opposing settling of the same [Tr. 244], and which motion was denied and the Bill settled [Tr. 242-3], appellant anticipates this same question will be raised before this Court and therefore respectfully submits the facts and the points and authorities thereon at this time.

The judgment was entered on May 10, 1935 [Tr. 220]. This term of Court expired September 8, 1935. Defendant served and filed its Motion for New Trial and Motion to Dismiss on July 9, 1935 [Tr. 220]. Hearings thereon were noticed for July 15, 1935, on which date they were continued by the Court to July 29, 1935, to give plaintiff an opportunity to reply thereto, [Tr. 225]. On this date the hearings were continued by another Judge to September 3, 1935, by reason of the absence of the trial Court, Honorable Geo. Cosgrave [Tr. 234]. On August 14, 1935, an order was made and filed extending the term of the Court in which this judgment was entered to and including September 9, 1935 [Tr. 240]. On September 3, 1935, to which the hearings on the Motions had been continued, the hearings were again continued by the Court, this time to September 9, 1935, and an order was made in open Court and recorded in the minutes of the Clerk of the Court that the term in which the judgment was entered was extended to and including said September 9,

1935 [Tr. 240-41]. On said 9th of September the Motion for New Trial was argued before, entertained and taken under submission by the Court [Tr. 240] and an order was signed and filed extending the term in which the judgment was entered as extended to and including November 1, 1935. On September 27, 1935, the Court denied the Motion for New Trial [Tr. 24]. On October 3rd an order was made and filed extending the term in which the judgment was entered and as extended to and including January 15, 1936, and extending the time within which the Bill of Exceptions in this cause may be served and filed to and including said January 15, 1936 [Tr. 241]. The proposed Bill of Exceptions was lodged on September 2, 1935, and proper notice of the filing and of the hearing of the settlement thereof served on opposing counsel [Tr. 49]. Motion to strike proposed Bill and opposition to settling same was filed [Tr. 244]. At the hearing appellant filed its points and authorities in opposition to objections of respondent [Tr. 247] and appellant's counsel filed his Petition for Relief for any technical error, if any, in his construction of the phrase in Rule 49 of the trial Court referring to the settlement of a Bill of Exceptions "after the entry of the judgment or order" [Tr. 252]. At the hearing upon the settlement the Court denied respondent's motion, held the term of Court in which the judgment was entered had been extended by orders of the Court while he had jurisdiction to make the same, held that the Bill of Exceptions had been lodged with him during said extended term and during the term in which the appellant's Motion for New Trial had been denied, and thereupon settled the Bill [Tr. 242]. Appellant submits the Bill of Exceptions was properly filed and settled for several reasons.

1. The trial Court, by orders made during the judgment term and the extensions thereof extended the same generally to and including November 1, 1935. The Motion for New Trial was denied on September 27th. At that time the judgment was finally entered. It is well settled that if a Motion for a New Trial is made or presented in season and entertained by the Court the time limit for Writ of Error or Appeal does not begin to run until the Motion is disposed of. Until then the judgment does not take final effect for the purpose of Writ of Error or Appeal and the proceeding is under the control of the trial Court.

Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 36; 37 L. Ed. 986;

Voorhees v. Noye Mfg. Co., 151 U. S. 135; 38 L. Ed. 101;

Kingman v. Western Mfg. Co., 170 U. S. 675; 42 L. Ed. 1192;

Brown v. Evans, 18 Fed. 56;

Clarke v. Eureka County Bank, 131 Fed. 145.

Within ten days thereafter, and before the expiration of the previous extension, and during the term in which the Motion for New Trial was ruled upon, the Court, on October 3rd, by written order generally again extended the term and specifically mentioned and extended the term and time in which the Bill of Exceptions herein was to be filed and settled to January 15, 1936. The Court therefore, by proper orders during the judgment term extended the term, and before the expiration of those extensions further extended it to a period beyond the date on which the Bill of Exceptions was settled. Clearly the Court had

jurisdiction over the cause and properly settled the Bill of Exceptions. The only complaint of the respondent is that the Bill was not settled in accordance with Rule 49 of the District Court, which requires that a person desiring to have a Bill of Exceptions settled shall serve a copy on the adverse party or his counsel and "file the same within ten days after the entry of the judgment or order."

The rule in this Circuit is well established that a Bill of Exceptions may be approved by the trial Court at any time during the judgment term or any extension thereof and while it has jurisdiction over the case even though not filed within the time specified by the Rule of the District Court. The cases in this Circuit so holding are:

Russo-Chinese Bank v. National Bank of Commerce of Seattle, 187 Fed. 80 (C. C. A. 9);

Twohy Bros. v. Kennedy, 295 Fed. 462 (C. C. A. 9);

Spokane Interstate v. Fidelity Deposit Co., 15 Fed. (2nd) 48 (C. C. A. 9);

Puget Sound Finance v. Nelson, 41 Fed. (2nd) 356 (C. C. A. 9).

In *Puget Sound v. Nelson*, *supra*, this Court states:

"Counsel moved to strike Bill of Exceptions because not filed within time prescribed by rules of the Court below. Whether the time for filing the Bill of Exceptions was extended by the pendency of a motion for new trial, we need not inquire, because the Bill was filed and settled during the term, and whether the local rule was followed or not is not controlling. (Citing cases.)"

In *Howard v. Louisiana & A. Railway Co.*, 49 Fed. (2nd) 571 (C. C. A. 5), *supra*, the appellant did not file the Bill of Exceptions within the forty-two days allowed by order in which to prepare and settle his Bill. Appellee contends the Court had no jurisdiction to thereafter allow, approve or settle the Bill. The Court states:

“The point is without merit. That the preliminary order granting forty-two days has no effect upon the inherent power of the Court at any time during the term to allow, approve, and order filed bills of exceptions is too elementary to require citation of authorities. The motion to strike is overruled.”

For other cases on this point see also:

In Re: Morrissey, 67 Fed. (2nd) 267 (C. C. A. 9);

Stanton v. Embry, 93 U. S. 548; 23 L. Ed. 983.

2. A Motion for New Trial pending at the adjournment of the judgment term, even when there are no orders specifically extending that term, carries the cause beyond the term for the purpose of settling the Bill of Exceptions as well as for the purpose of disposing of the Motion for New Trial. This rule has been definitely established in virtually all of the Circuits. Some of the cases clearly supporting this rule are:

Missouri K. & T. Railway Co. v. Russell, 60 Fed. 501 (C. C. A. 8);

U. S. v. Carr, 61 Fed. 802 (C. C. A. 8);

Woods v. Lindvall, 48 Fed. 73 (C. C. A. 8);

Tullis v. Lake Erie, etc., 105 Fed. 554 (C. C. A. 7);

Mahoning Valley Railway v. O'Hara, 196 Fed. 945 (C. C. A. 6);

Camden Iron Works v. Sater, 223 Fed. 611 (C. C. A. 6);

Slip Scarf v. Filenes Sons Co., 289 Fed. 641 (C. C. A. 1);

Moore Grocery Co. v. Pacific R. M., 296 Fed. 828 (C. C. A. 8);

U. S. Shipping Board v. Galveston Drydock, 13 Fed. (2nd) 607 (C. C. A. 5);

Great Northern Life Ins. Co. v. Dixon, 22 Fed. (2nd) 655 (C. C. A. 8).

The reason for the rule is clearly stated in *Mahoning Valley Railway v. O'Hara*, *supra*, wherein its says:

“The circumstances which lead to this latter result are applicable here. It would be a vain thing to settle a Bill of Exceptions upon a judgment still contingent; and we are clear that the Court had full power over this subject during the remainder of the term, at which time the Motion for New Trial was decided. It follows plaintiff in error is entitled to be heard upon all its assignments.”

A clear statement of the rule is found in *Moore Grocery v. Pacific*, *supra*, where the Court states:

“It has long been the rule in this and other Circuit Courts, that a Bill of Exceptions is presented in time if it is presented for allowance at the term at which the motion for a new trial is determined, although that term is subsequent to the term at which the trial was had and judgment entered, if the motion for new trial was filed at the trial term, and the hearing of it was continued by the Court to a subsequent term. (Citing cases.)”

This Circuit Court has given effect to the rule for on a Petition for Rehearing in the case of *Shallas v. U. S.*, 37 Fed. (2nd) 692, wherein apparently a Motion for New Trial was filed in judgment term but no order was made extending the term, and the Bill of Exceptions was settled during the term in which the Motion for New Trial was ruled upon, said Bill of Exceptions was considered by this Court upon its merits upon the Petition for Rehearing. This Court stating:

“In his Petition for a rehearing, the Appellant contends that a Motion for a New Trial was pending at the time of the final adjournment for the term, and that this motion carried the case over beyond the term for the purpose of settling a Bill of Exceptions, as well as for the purpose of disposing of the Motion for a New Trial. *This contention is no doubt well supported by authority.* Woods v. Lindvall (C. C. A.) 48 F. 73; Merchants’ Ins. Co. v. Buckner (C. C. A.) 98 F. 222; Tullis v. Lake Erie & W. R. Co. (C. C. A.) 105 F. 554; Kentucky Distilleries & Warehouse Co. v. Lillard (C. C. A.) 160 F. 34; Mahoning Valley Ry. Co. v. O’Hara (C. C. A.) 196 F. 945; Slip Scarf Co. v. Wm. Filene’s Sons Co. (C. C. A.) 289 F. 641; O. J. Moore Grocery Co. v. Pacific Rice Mills (C. C. A.) 296 F. 828; U. S. Ship. B. E. F. Corp. v. Galveston Dry Dock & C. Co. (C. C. A.) 13 F. (2nd) 607”

This Motion for New Trial was filed in season. The Court took jurisdiction thereof on July 15, 1935, when it continued the hearing thereon. It continued to exercise jurisdiction over the Motion and carried it over into the

next term. During the term in which it was ruled on, the Bill of Exceptions was settled. These facts meet squarely all the requirements of the above rules, and it logically follows the Bill of Exceptions was properly and correctly settled.

3. Rule 49 of the District Court provides:

“A party desiring to have a Bill of Exceptions settled in either a civil or criminal cause shall prepare a draft thereof and, after serving a copy on the adverse party or his counsel, file the same within ten (10) days after the entry of the judgment or order. The adverse party shall within ten days thereafter, in like manner serve and file amendments to the Bill. After the expiration of the time allowed, the Bill and amendments shall be presented to the judge for settlement, after notice to the adverse party. If no amendments are filed, no notice of presentation shall be required. The time within which the bill and amendments are required to be served and filed may be extended by order of Court.”

Appellant's counsel construed this rule to mean that the time for the settling of the Bill of Exceptions did not start to run until the judgment had become final, for as said in the *Mahoning* case “It would be a vain thing to settle a Bill of Exceptions upon a judgment still contingent.” The Motion for New Trial had been properly filed within the judgment term and had been entertained by the Court during that term. Counsel considered the motion meritorious and naturally did not anticipate it

would be denied. He consulted the authorities and found the rule to be that the time for the presentation of a Bill of Exceptions runs from the determination of a Motion for New Trial provided the Motion was filed at the trial term and the hearing continued by the Court to the subsequent term. In the many cases considered no case was found contrary to this rule. Relying thereon he waited until the Motion for New Trial had been disposed of before obtaining an order specifically extending the time to file a Bill of Exceptions though orders generally extending the term for all purposes were from time to time obtained. Within ten days after the ruling thereon he complied with said Rule 49 and obtained his order extending the time in which to settle a Bill of Exceptions to January 15, 1936. These matters are set forth in his Petition which is found at pages 252-57 of the transcript. Appellant respectfully requests this Court to consider said Petition for Relief and the case of *Marian Steam Shovel Co. v. Reaves*, 76 Fed. (2nd) 462 (C. C. A. 8) and should this Court feel that there has been some technical misconstruction of said rule or default by appellant's counsel, that relief therefor be granted by this Court to the end that this appeal be determined upon its merits and that the Bill of Exceptions be considered properly settled.

By reason of the above appellant submits the Bill of Exceptions was properly settled and is properly before this Court.

CONCLUSION.

Many errors have been assigned by the appellant. It respectfully submits that each assignment is meritorious and that each error was prejudicial to it. An attempt has been made to make this Brief as brief as possible and yet, in justice to this Court, give some attention to each of the errors assigned. The appellant respectfully submits it did not receive a fair and impartial trial and in such instances it is necessary to bring all of the matters complained of to the attention of this Court as the presumption is that the proceedings in the trial Court were valid and proper. The indulgence of the Court for this rather long Brief is therefore asked.

Appellant particularly urges that neither the State nor District Court had jurisdiction over it because it was not doing business in the State of California, as the term "doing business" has been defined by the Federal Courts and other Courts, at the time it was sued in California. The evidence which was before the trial Court upon this question at the time that he decided it is before this Court, and this question being a mixed one of law and fact may and should be determined by this Court. Appellant urges that no other finding is possible under the circumstances but that it was not doing business in the State of California at that time and hence it was not subject to the jurisdiction of either the State or District Court. Under these circumstances this case should be reversed, without the necessity of considering the other points raised on this

appeal, and the lower Court should be instructed to enter an order of dismissal.

A further point specially urged is that the service of process in this proceeding upon the Secretary of State was ineffective for any purpose in view of the fact that the statutory requirements to permit such substituted service were not strictly complied with. If this Court finds in favor of the appellant on this point, and which we respectfully urge it should do, then the further Assignments of Error need not be considered but the case may be reversed and the trial Court ordered to dismiss the cause.

The Assignments of Error as to the conduct of the trial Court during the trial and upon objections to the admission of evidence, motions that were made during the proceedings and his instructions to the jury, while each is urged as meritorious and prejudicial, when taken together and in conjunction with each other should, in view of the fact that this case was tried before a jury, convince this Court that appellant did not have a fair and impartial trial but that a prejudice was created against it and a sympathy was created for the plaintiff which caused the jury to return the excessive verdicts it did.

The insufficiency of the evidence to justify the verdict is well taken in our opinion. That respondent is not entitled to any punitive damages because of failure to plead and allege for the same and because the evidence does not justify any such finding, is also a point well taken. Considering the case from its four corners appellant respect-

fully submits that this Appellate Court will heartily agree that the defendant has been deprived of a fair and impartial trial, that the Assignments of Error are with merit, that the errors committed were prejudicial, and that the judgment entered herein should be reversed with costs for appellant.

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No. 8138

IN THE
United States ¹³
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

LIQUID VENEER CORPORATION,
a corporation,

Appellant,

vs.

LENA G. SMUCKLER,

Appellee.

BRIEF OF APPELLEE

HARRY GRAHAM BALTER
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FILED

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

LIQUID VENEER CORPORATION,
a corporation,

Appellant,

vs.

LENA G. SMUCKLER,

Appellee.

BRIEF OF APPELLEE

I.

**COMMENTS ON APPELLANT'S STATEMENT
OF THE CASE**

For the sake of clarity, appellant will be referred to in this brief as defendant and appellee will be referred to as plaintiff.

Defendant in both a "Concise abstract of case" (App. Br., p. 3) and in a "Detailed statement of the case" (App. Br., p. 8) sets out with a great deal of repetition an attempted summary of the facts involved in this litigation.

Plaintiff will not chronologically recite the facts as a separate and distinct part of her brief, but suffice it to

say for the time being that defendant's statement of the case does not adequately present the vital issues; the forest has been lost sight of in the jungle of trees.

As various issues raised by defendant are discussed, the facts involved will be alluded to in detail.

II.

SERVICE OF PROCESS ON THE SECRETARY OF STATE WAS ENTIRELY PROPER

(a) When the Chaff is Separated From the Wheat,
We Find That Six of the Nine of Defendant's
Sub-arguments Under This Heading Are Entirely
Non-controversial or Unimportant.

For 32 pages (App. Br., pp. 65 to 97) counsel for defendant laboriously attempts to build up an argument to the effect that the Liquid Veneer Corporation at the commencement of the suit was improperly served with process. So much of the discussion is mere repetition and so much more merely discusses elementary principles with which there can be no quarrel, that one begins to suspect that defendant has resorted to the age old device of endeavoring to give weight to its argument by putting up straw men.

Nine separate sub-arguments are created to bolster the main thesis that the corporation was improperly served. With six of these sub-arguments there need be no controversy—they are the straw men, to-wit:

Sub-argument number 1 is a discussion of the applicable code sections of the State of California at the time

that the service of summons was made. (App. Br., p. 67.)

Sub-argument number 5. Proper service of process is absolutely necessary in order for a court to acquire jurisdiction or to proceed against a person named as a party defendant. (App. Br., p. 91.)

Sub-argument number 6. Removal of the case from the state court to the Federal court does not eliminate necessity of proper service. (App. Br., p. 92.)

Sub-argument number 7. Jurisdiction over the parties must affirmatively appear in the record itself and not in the Bill of Exceptions, and the question as to its existence may be raised at any time. (App. Br., p. 93.)

Sub-argument number 8. A petition for removal does not amount to a general appearance so as to deprive defendant of the right to raise the question of proper service of process. (App. Br., p. 94.)

Sub-argument number 9. Where want of jurisdiction appears, the Circuit Court of Appeals in remanding the cause to the District Court should direct a dismissal for want of jurisdiction. (App. Br., p. 95.)

Although defendant admits that this statement is not supported by authorities, we can pass it at this time as merely an academic discussion.

As a matter of fact it is extremely doubtful that the case should be dismissed even if process were defective. The more correct rule would seem to be the following:

6 *Cyc. of Federal Procedure*, 695:

“Where the fault of jurisdiction below was lack of personal service or authorized appearance, re-

versal was made with directions to proceed accordingly and investigate irregularities in entering the appearance,” citing:

Hatfield v. King, 184 U. S. 162, 46 L. Ed. 481, 22 Sup. Ct. 477.

Therefore, when we eliminate the non-controversial arguments, the gist of defendant’s thesis is contained in sub-arguments number 2 (App. Br., p. 73), sub-argument number 3 (App. Br., p. 75) and sub-argument number 4 (App. Br., p. 78).

Reduced to simple understandable phraseology, defendant urges that the judgment in favor of plaintiff should be vacated and the case dismissed, because there is nothing in the record of the case to show that plaintiff had a right to serve the Secretary of State under the provisions of Section 406 (a) of the *California Civil Code*.

(b) The State Has the Right to Subject Foreign Corporations to Any Method of Service of Process so Long as it is Reasonably Effective in Bringing Due Notice to Defendant Corporation.

Defendant cites numerous cases tending to sanctify the indispensability of “personal” service in order to acquire jurisdiction over a defendant (App. Br., pp. 78 to 91).

There should be no dispute over this principle.

[1] *But defendant has completely failed to distinguish between the situation where the defendant is an individual person and where defendant is a foreign corporation.*

In the first place, there is no well defined distinction between “personal,” “constructive” and “substituted” service. So much of defendant’s complaint is on the ground that the inviolable right to “personal” service has been ignored, that it might be well by way of prelude to quote a pertinent paragraph from a great authority on the law of corporations.

Fletcher Cyc. Corporations, Vol. 9, Chap. 51, pp. 255 and 256:

“In one sense, all service of process on corporations is either substituted or constructive, for the reason that the corporate entity is incapable of service other than through persons who represent it; but for practical purposes service on the proper officer or agent of the corporation is considered personal, rather than substituted or constructive, service. The difference between personal, substituted and constructive service is not well defined. Generally, however, ‘personal service’ means the actual delivery of the process to the person to be served, although service outside the state is generally referred to as constructive rather than personal service. ‘Substituted service’ is sometimes confined in its meaning to service by leaving a copy at the home of the person to be served. ‘Constructive service’ includes, in its most general form, service by publication, although undoubtedly the term is broad enough to

cover service on a state officer as provided for by statute.

“Strictly speaking, there cannot be personal service upon a corporation, as the corporate entity is incapable of service except through persons representative of it. *Berg v. Associated Employers’ Reciprocal*, 47 Idaho 386, 279 Pac. 627.

“Service of process on a domestic corporation by service on the secretary or deputy secretary of state, although denominated by the statute ‘personal service’ is substituted, as distinguished from constructive, service; that is, it is service on a person who does not sustain any actual agency relation to the corporation but who is merely designated by the statute as an agent for the purpose of service of process. *Rothrock v. Bauman*, 73 Mont. 401, 236 Pac. 1077, citing *Fletcher Cyc. Corp.* (1st Ed.), Sec. 3005.”

- [2] *It is too well settled to admit of controversy that in the case of foreign corporations an entirely different set of principles control.*

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 295:

“As already shown elsewhere, corporations are not entitled under the Constitution of the United States to all the privileges and immunities of citizens in the several states. Any state may, therefore, within certain limitations heretofore adverted to, prescribe the terms and conditions on which foreign corporations may act therein; and this power undoubtedly allows the state to prescribe the mode of service of process of its courts upon a foreign corporation doing business there, on the ground that the state may, if it sees fit, entirely exclude foreign

corporations from its borders. 'The right of each state to enact laws for the service of original notice or summons upon foreign corporations not authorized to do business in such state, within prescribed constitutional limitations, is well settled.' Or as the rule has been otherwise expressed: Where a corporation created by one state goes into another state for the purpose of transacting the business of the corporation through its officers, agents, employees, and servants there located, it may be required to appear personally before the courts of such state on any terms to which it has assented as a condition precedent to the right to engage in its corporate business within the state, or it may be required to respond personally to such method of service as the legislature of such state may provide, as long as the method prescribed by the legislature constitutes due process of law. And such statutes have been declared to be neither 'unreasonable nor in conflict with any principle of public law,' and their purpose of compelling corporations which do business in a certain jurisdiction to submit to the domestic forum the questions arising therefrom is held to be 'highly proper.' "

Bowers Process and Service, pp. 466, 467, 468, 469:

"The views just referred to have been drastically modified in later times to meet the necessities arising through the vast expansion of the business transacted by corporations beyond the bounds of the states of their origin, and to permit the courts of such as they enter to exercise their jurisdiction in the protection of the rights of their own citizens in the multifarious situations arising from such extensive operations. According to the new view, when a corpora-

tion enters a foreign state and there transacts its business, it is legally present in that state and for jurisdictional purposes in actions brought against it, is in the same position as an individual who is present in such state, or is at least in a position analogous to that of such an individual. * * *

“Based upon the early *dictum* of the federal Supreme Court already referred to, that a corporation could have no legal existence outside the state of its creation, it has been announced with a positiveness that invites no argument, that such a corporation could not at common law be subjected to personal service of process beyond the state lines, and that only by force of a special statute could such be accomplished. A typical expression of such view was made by the Alabama court thus: ‘Without legislative enactment, a foreign corporation could not be sued outside of the state of its domicile, for the reason there were no means provided by which service could be had upon it. By the common law, to maintain a personal action against a corporation, there must have been service of process upon the principal officer within the jurisdiction of the sovereignty creating it. The officer upon whom, in the sovereignty of its creation, service could be legally had, binding the corporation, it may be could be found in another jurisdiction, but he was not regarded as carrying with him his official functions, and service upon him there would not bind the corporation.’ While the discussion of this question would perhaps be academic at this day on account of the fact that nearly all the states of the Union have legislated upon the subject, it is not amiss to express the view of the writer that the decisions referred to in this section would not stand up under the theory of the presence

of the corporation in the foreign state where it does business, nor do they comport with the pronouncements of the case of *Barrow S. S. Co. v. Kane*, that 'The manifest injustice which would ensue if a foreign corporation, permitted by a state to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus while allowed the benefits, be exempt from the burdens, of the laws of the state, has induced many states to provide by statute that a foreign corporation, making contracts within the state, shall appoint an agent residing therein upon whom process may be served in actions upon such contracts. This court has often held that whenever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation either in the courts of the state, or, when consistent with the acts of Congress, in the courts of the United States, held within the statutes, but it has never held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States * * * the liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.' "

Fletcher Cyc. Corp., Vol. 18, Chapter 67, pp. 305 to 309:

"If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission, and corporations that subsequently do business in the

state are to be deemed to consent to such condition as fully as though they had specially authorized such agents to receive service of the process. And its admission to do business in the state is a sufficient consideration for such agreement. The same doctrine has been laid down in many other cases, state and federal, and it has been said to constitute a 'part of the common law' of this country.

" 'A state,' it was said by Justice Field, 'may impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just, and such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of process.'

"As some of the state courts express the rule: 'It is well settled that (subject to constitutional limitations) a state may prescribe the terms upon which alone it will permit foreign corporations to do business within its borders. And where a state imposes as a condition, on which a foreign corporation may do business therein, that it accepts as sufficient the service of process upon certain designated officers or agents within the state, a foreign corporation

subsequently doing business in the state is deemed to assent to such condition, and to be bound by the service of process in the manner specified by the statute.' Of course, the consent of the corporation to be bound by such service of process is not an actual consent, but an implied one. It has been said to be 'a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense.' "

[13] *It has been repeatedly held that state statutes providing for service of process upon foreign corporations which come into the state to do business, if reasonable, afford due process of law.*

Hudson v. Georgia Casualty Company, 57 F. (2d) 757, 758;

Lafayette Insurance Company v. French, 18 How. 404, 15 L. Ed. 451;

St. Clair v. Cox, 106 U. S. 356, 1 Sup. Ct. 354, 27 L. Ed. 222;

New England Life Insurance Company v. Woodworth, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379;

Mutual Reserve Fund Life Insurance Company v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987;

Connecticut Mutual Life Insurance Company v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569.

In the *Lafayette* case, *supra*, the Supreme Court as early as 1855 laid down this principle:

"We consider this foreign corporation, entering into contracts made and to be performed in Ohio,

was under an obligation to attend, by its duly authorized attorney, on the courts of that State, in suits founded on such contracts, whereof notice should be given by due process of law, served on the agent of the corporation resident in Ohio, and qualified by the law of Ohio and the presumed assent of the corporation to receive and act on such notice; that this obligation is well founded in policy and morals, and not inconsistent with any principle of public law; and that when so sued on such contracts in Ohio, the corporation was personally amenable to that jurisdiction; and we hold such a judgment, recovered after such notice to be as valid as if the corporation had had its *habitat* within the State; that is, entitled to the same faith and credit in Indiana as in Ohio, under the constitution and laws of the United States." (pp. 344 and 345.)

In *St. Clair v. Cox*, supra, this doctrine was reaffirmed:

"This doctrine of the exemption of a corporation from suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States. To meet and obviate this inconvenience and injustice,

the legislatures of several States interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred. * * *

“The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he

can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in *Lafayette Insurance Co. v. French*, to which we have already referred, sustains these views." (pp. 355, 356 and 357.)

- [4] *It has been established for many years in conformity with this general principle, that a state statute permitting service of process on a foreign corporation by serving a state official is entirely valid and binding.*

(a) A general statement of the principle permitting service on a state official.

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 461:

"The object of such statutes is to enable the courts of a state in which a foreign corporation has engaged in business to render personal judgment against the foreign corporation where it withdraws its agents from the state. Under statutes providing for service of process only upon agents or officers of foreign corporations, foreign corporations may come into the state, transact business, commit wrongs against its citizens, for which the only remedy is an action for damages, and before service can be made upon the agent or other officer named in the statute, such agent or officer can be withdrawn from the state, and leave the injured party practically without remedy. Statutes providing for the acquisition of jurisdiction over foreign corporations by service of summons by publication, where no agent or officer of the corporation is found in the state upon whom

process might be served, are likewise ineffective, for the power of the court, in cases of default, is limited under well-settled rules to rendering judgment in rem. Manifestly legislation of the character under consideration is salutary, and necessary to remedy such defects. But in order to render a personal judgment against a foreign corporation based upon service of process upon a prescribed state official, it is essential that the corporation be engaged in doing business in the state."

Fletcher Cyc. Corp., Vol. 17, Chapter 67, pp. 446 to 450:

"Foreign corporations, desiring to do business in the state, may be required by statute to appoint some state official, such as the secretary of state, to receive process in suits against them. The simple requirement, considered above, that foreign corporations shall designate a resident agent for process, is not always sufficient to accomplish the purpose sought to be attained. For the corporation may fail to comply with the requirement, or the agent appointed may resign, be removed, die or become incapacitated. And to meet such contingencies, provision is usually made for service of process on some state official, such as the secretary of state or, in case of foreign insurance companies, the commissioner or superintendent of insurance, or some other designated official, or upon some officer or stockholder of the corporation present in the state.

"Such legislation has been frequently called in question, and as frequently decided to be a valid exercise of the power residing in the states to exclude foreign corporations altogether from their borders, or to admit them upon such terms and condi-

tions as the states may deem proper for the protection of their own interests and those of their citizens.”

And such statute should be liberally construed to effectuate the end of bringing the foreign corporation before the forum.

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 316.

“Although statutes allowing suits against foreign corporations are in derogation of the common law, statutes which provide for service of process on foreign corporations should be liberally construed for the accomplishment of the purpose intended, namely, that of bringing such bodies into court. They are permitted to enter the state by comity only, and in the methods of subjecting them to the jurisdiction of the courts they cannot insist upon a technical or strict construction in their favor.”

The modern point of view is that the main purpose of the process statute is to bring the foreign corporation before the court, and if the statute sets out different ways of accomplishing the same end, they are construed to be “cumulative” and not “exclusive.”

Fletcher Cyc. Corp., Vol. 18, Chapter 67, pp. 322, 323; (footnote 17, p. 323).

“Thus it is held that a statute providing that when suit is against a corporation, the summons may be executed by delivering a copy of the summons and complaint to the president, or other head thereof, secretary, cashier, station agent, or any other agent thereof, includes foreign as well as domestic corporations, and that other statutes making special pro-

visions for service on foreign corporation doing business in the state, when they are sued, are cumulative, for the greater convenience of those who desire to institute legal proceedings against such corporations, and to hold otherwise would be by judicial construction to render nugatory the statute first mentioned.”

Citing: *Eagle Life Ass'n. v. Redden*, 121 Ala. 346, 25 So. 779. See §8771.

It is held in Nebraska that a statute providing that “a summons against a corporation may be served upon the president * * * chairman of the board of directors or trustees, or other chief officer, or, if its chief officer is not found in the county, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof,” applies to all corporations having an office or usual place of business in the state, whether a foreign corporation or one organized under the laws of the state, notwithstanding the existence of another statute providing that where a foreign corporation has a managing agent in the state, the service may be on such agent. The court said:

“It is the policy of our law to afford redress through our courts to any person aggrieved, whether a natural person or a corporation, and to apply the remedy, as far as possible, at the place where the injury was sustained. If a foreign corporation has an office in this state for the transaction of business, seeking thereby to promote its own interest, such office will also be its place of business where a summons may be served upon it; and a party aggrieved will not be required to go into another jurisdiction

to enforce his rights against it. It must take the burden with the benefit."

Chicago, B. & O. R. Co. v. Manning, 23 Neb. 552,
37 N. W. 462.

(b) So it has been held that service of process on a foreign insurance company by serving the state insurance commissioner is valid.

Mutual Reserve Fund Life Insurance Company v. Phelps, (supra);

Ex parte Schillenberger, 96 U. S. 369, 24 L. Ed. 853;

Cartmell v. Mechanics' Insurance Company, 167 Tenn. 498, 71 S. W. (2d) 688.

(c) Consistent with the aforementioned principle, statutes providing for service of process on a foreign corporation by serving the Secretary of State have been uniformly held to be valid.

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 463:

"The due process provision is not violated by a statute providing for service of process on a foreign corporation doing business in the state by service on the secretary of state in the event of such corporation having no agent residing in the state upon whom process may be served. Thus a statute providing that, if a foreign corporation doing business in a state shall fail to maintain therein an agent to receive service of process, it shall be bound by service of process upon a designated state official of the state is held to be constitutional, and not in violation of the constitutional provision that no state shall

make any law depriving any person of his property without due process of law.”

St. Mary's Franco-American Petroleum Company v. West Virginia, 203 U. S. 193, 51 L. Ed. 144, 27 Sup. Ct. 132;

Wylie Permanent Camping Company v. Lynch, 195 Fed. 386;

Vance v. Pullman Company, 160 Fcd. 707;

Silva v. Crombie Company, New Mexico, 44 Pac. (2d) 719.

For a detailed discussion see

1 *L. R. A.* (N. S.) 558.

(d) As if to completely demonstrate that there is no longer any sanctity to “personal service” (upon which defendant leans so unduly), it is only necessary to examine the reasoning of the courts which have uniformly held valid laws which nearly all the states have adopted for substituted service on non-resident motorists where the cause of action arose within the state.

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 472:

“In many of the states statutes have been enacted and upheld which provide that nonresident automobilists who come into the state and inflict damage to person or property therein, may be served by leaving a copy of the summons with the secretary of state, and notifying the nonresident in a prescribed manner.”

Calif. Gen. Laws 1935 (Deering) p. 1435, Act 5132 (Motor Vehicle Act) Sec. 404;

Bischoff v. Schnepp, 139 Misc. 293, 249 N. Y. Supp. 49;

Cahill's Ill. Rev. St. 1931, Ch. 95a, 21 (1);

N. C. Ann. Code 1931, §491(a);

1 *S. D. Comp. Laws* 1929, §2338-A.

See also:

80 *Pa. Law Review* 909;

32 *Mich. Law Review* 325-350;

82 *A. L. R.* 769.

(c) There Can be no Doubt That California Has Long Ago Ruled That Its Laws Permitting Service of Summons on a Foreign Corporation by Serving the Secretary of State Are Valid.

S. Olender v. Crystalline Mining Company, 149 Cal. 482 at 483 and 484, 86 Pac. 1082:

“Appellant is a foreign corporation created and existing under the laws of Great Britain and doing business in California. By an act of the legislature of this state, approved March 17, 1899, (Stats. 1899, p. 111), it is enacted that a foreign corporation doing business in this state must designate, by a writing filed with the secretary of state, some person as its agent upon whom process may be served, and that if it fail to do so, service of summons in civil actions against it may be served on the secretary of state. In the case at bar the defendant did not designate such agent, and service of summons was made on the secretary of state. The main contention made by appellant is that said act of the legislature is unconstitutional and void; but this contention is not maintainable. The positions taken are that the state cannot arbitrarily appoint as an agent for appellant one between whom and appellant there is no actual relation of principal and agent, that the law does not

require the secretary of state to communicate to a defendant any information of the service of summons, that if the service be held sufficient, appellant would have no notice of the proceeding and no opportunity to be heard, and therefore a judgment on such service would deprive appellant of his property without due process of law. These positions are not tenable. The cases of *Keystone Driller Co. v. Superior Court*, 138 Cal. 738, [72 Pac. 398], and *Wiley v. Benedict Co.*, 145 Cal. 270, [79 Pac. 270], cited by respondent, are not direct decisions on the point, although they seem to assume the constitutionality of the act in question; but, upon principle, we think that the respondent's contention is clearly maintainable. When a foreign corporation undertakes to do business in this state it is bound to know the existing law as to its right to do such business; and in the case at bar the appellant knew that as a condition of its doing business here, it must, under the law, appoint an agent upon whom process could be served, and that if it refused to appoint such agent, service could be made on the secretary of state. There is nothing unjust or unconstitutional in such a law."

[1] The only limitation which has been placed upon this type of statute is that some decisions hold that the requirement of due process is not met unless provision is made whereby the Secretary of State actually notifies the defendant foreign corporation that suit has been filed against it.

Southern Railway Company v. Simons, 184 Fed. 959;
King Tonopah Mining Company v. Lynch, 232 Fed.
485.

The California statute until the year 1917 did not require the Secretary of State to actually notify the defendant corporation of the service of summons upon him.

Even then the Supreme Court of California in *Olender v. Crystalline Mining Company* (supra) held the statute entirely valid, simply saying *anent*:

“The appellant would have had full notice of the commencement of the action, and an opportunity to be heard, if it had put itself in the position of having such notice by simply complying with the reasonable requirement of the law that it appoint an agent to receive such notice; and by its failure to do so indicated its willingness to have such notice given to the secretary of state. It is, therefore, in no position to invoke the constitutional doctrines that a defendant must have notice of an action against him and an opportunity to be heard therein.” (p. 484).

The Supreme Court of California could have followed an earlier decision in *Willey v. Benedict*, 145 Cal. 601, (1904), in which case a default judgment was set aside for improper service on the Secretary of State; but the court refused to do so in the *Olender* case (supra).

However, several later California cases construing the California statute as existing before it was amended in 1917, indicated a lack of willingness to sustain default judgments where service was made on the Secretary of State but where no knowledge of the suit had been brought home to the defendant corporation.

See for example

Winston v. Idaho Hardware Company, 23 Cal. App. 211;

Holiness Church v. Metropolitan Association, 12 Cal. App. 445;

Knapp v. Bullock Tractor Company, 242 Fed. 543.

In order to strengthen the statute and to eliminate any doubt as to its affording "due process," the statute was amended in 1917 so as to make it the duty of the Secretary of State to notify the defendant corporation of the pending suit by registered mail. (Section 406(a), *California Civil Code* as amended 1921; this statute as appeared before 1917, was numbered Section 405 of the *California Civil Code*.)

Under the most stringent tests, there can be no doubt but that this statute as now amended and as it existed at the time of the service of process on the defendant in the case at bar, was entirely constitutional and binding.

[2] The case of *Willey v. Benedict* (supra) is neither applicable nor controlling.

Appellant leans heavily upon the case of *Willey v. Benedict* (supra) which has some language indicating that service of process on the secretary of state is improper unless there is an affirmative showing in the record that service could not have been made upon an agent designated by the defendant foreign corporation or if none had been designated, that there is evidence in the record to that effect.

This decision—and it stands alone not having been followed by any California Supreme Court decision in which a holding based on that case would be necessary—is readily distinguished from our instant case:

(a) In the first place, a judgment by *default* had been obtained; and

(b) In the second place, being a default case, there was no record from which it would appear whether or not an agent had been designated to receive service for the defendant corporation and whether diligent search had been made for such an agent.

The case at bar presents an entirely different situation from that involved in *Willey v. Benedict* (supra), is that:

[1] The Liquid Veneer Corporation was actually notified of the pending suit; in fact it appeared and defended on its merits.

In this connection, it should be said *that every case without exception which defendant cites where service of process was held to be bad, was a default case. Naturally, in a default case, the court is more critical of all technical requirements.*

But inasmuch, as was indicated in *King, etc. v. Lynch* (supra), the whole purpose of the statute regulating process of service is to bring home to the defendant notice of the action, there is no need for any strained and technical interpretation where the defendant corporation actually appears and defends.

As the Supreme Court of California very pointedly said in *Olcender v. Crystalline Mining Company* (supra):

“The defendant does not ask to defend, it merely asks to be allowed to escape the necessity of making any defense.”

The Court, therefore, in that case refused to set aside a default judgment on alleged irregularity of service of process on the defendant foreign corporation, where the motion relied on no grounds of fraud, inadvertence, etc., and where no offer was made to interpose a valid defense if the default were voided.

The same comment should be made respecting so many of the cases which defendant cites and where the “constructive” service of process spoken of is service by publication. Some justification can be made for a technical construction in this type of service, because where the summons is published, under most early statutes, there was little likelihood of the defendant actually being notified of the pendency of the suit. But in the case at bar, the defendant was actually given ample notice to appear and to defend itself, which it did to the best of its ability.

The point we are making, namely, that *Willey v. Benedict* (supra) loses its significance in view of the requirement of giving actual notice to the foreign corporation is fully demonstrated by the manner in which the case is commented upon in California Jurisprudence.

In 21 *Cal. Jur.* 495, *Willey v. Benedict* is cited as an authority for the following statement:

“In all cases in which constructive service is permitted, or in which jurisdiction may be obtained of the thing by a prescribed form of notice, *where the real party in interest has no actual notice and does*

not appear or subject himself to the jurisdiction of the court, the mode of service prescribed by the statute must be strictly pursued, and the existence of the conditions upon which such service depends must be affirmatively shown.” (Italics ours.)

[2] The record in the case at bar clearly shows that there was no one else to serve but the Secretary of State.

In *Willey v. Benedict* (supra), the Court failed to find any evidence in the record of inability to serve an agent of the defendant corporation because:

(a) “* * * in the first place, the statute does not provide for any certificate of the Secretary of State as evidence of that fact [that the defendant corporation had designated no person upon whom service might be made] in aid of the Sheriff’s return or otherwise, and if it could be availed of at all, it does not pretend to be, and is no part of the return of the Sheriff” and

(b) “Nor is it any part of the record, which in cases of judgment by default, consist of the summons, with affidavit or proof of service, the complaint, with a memorandum endorsed thereon of the copy of defendant’s default, and a copy of the judgment.”

Even if binding, this reasoning is no longer valid or applicable:

(1) The statute now distinctly makes the certificate of the Secretary of State evidence that no record of the foreign corporation or of any officers thereof have been filed with him.

Civil Code, §406a:

“Upon receipt of such process and fee the secretary of state shall forthwith give notice to the corporation by telegraph, charges prepaid, both to its principal or home office and to its principal office in the state, of the service of such process, and shall forward to each of such offices by registered mail, a copy of such process, or in case he has no record of such corporation or such offices, then such notice shall be telegraphed and such copies shall be mailed to the corporation, at the address given in the statement delivered to the secretary of state at the time of such service. The corporation shall appear and answer within thirty days after the secretary of state gives notice as aforesaid. The certificate of the secretary of state, under his official seal, of such service shall be competent and sufficient proof thereof. The secretary of state shall keep a record of all process served upon him and shall record therein the time of such service and his action in respect thereto. [Added by Stats. 1931, p. 1832.]

and

(2) The case at bar not being a default, the Court may look to any part of the record to see whether there was an agent designated by the defendant corporation who could have been served.

Vaughn v. Pine Creek Tungsten Company, 89 Cal. App. 759;

Musser v. Fitting, 26 Cal. App. 746 at 751;

Roehl v. The Texas Company, 107 Cal. App. 691, 705.

14a *Corpus Juris*. 1419:

“All the facts sustaining the jurisdiction need not appear from the return, however, if they otherwise are shown by the record * * *.”

See also an intelligent statement of the rule in *Municipal Paving Company v. Herring*, 50 Okl. 470, 472, 150 Pac. 1067:

“Plaintiff elects to proceed against the defendant under this section, and by having service made upon the Secretary of State impliedly states that the conditions under which the statute authorizes such service exists. To require him to make an affirmative showing to that effect would be to require him to prove something that no one knew better than the defendant itself. * * * We hold the service sufficient, in the absence of a showing by the defendant that it either had a service agent or an officer in the state upon whom process could be had.”

We find the following clear uncontradicted evidence in the record that there was no one other than the Secretary of State who could or should have been served:

(1) Affidavit of Frank C. Jordan, Secretary of State:

“I FURTHER CERTIFY that the records of this office do not contain the name of said defendant corporation, or show the location of its offices.” (Tr., p. 27).

(2) Affidavit of Robert V. Jordan, Assistant Secretary of State:

“That there are not now on file, nor have there ever been on file in the office of the Secretary of State any copies of the Articles of Incorporation of

Liquid Veneer Corporation, or any statement of Liquid Veneer Corporation of any kind or character, or any designation of any person as the agent of Liquid Veneer Corporation for services of process or authorized to receive service of process, or any consent of Liquid Veneer Corporation to any service or process of any document or paper of any kind or character for or on behalf of Liquid Veneer Corporation. That Liquid Veneer Corporation is not a corporation organized or existing under or by virtue of the laws of the State of California, and is not now and never has been at any time qualified to do business in the State of California.” (Tr., pp. 54 and 55).

(3) Affidavit of Martin J. Cabana, Executive Vice-President of Liquid Veneer Corporation:

“That said Defendant above named is not now, nor has it ever been at any time, engaged in or been doing business in the State of California, nor has it at any time maintained an office or place of business anywhere within said State; that it has not now, nor has it at any time ever designated or authorized in the State of California any person, firm or corporation whatsoever to accept service of process upon it or otherwise; that at no time has Defendant above named ever had any officers, agents, person or persons upon whom process could be served residing in the State of California, nor has it ever had at any time any property, either real or personal, within said State, excepting goods ‘in transit.’ That at no time has the Defendant Corporation ever filed its Articles of Incorporation with the Secretary of State of the State of California or made any effort to

qualify itself to do business within the State of California and that it has never designated or authorized the Secretary of State of the State of California, or one E. C. Mack, or any other person within said State of California to receive or accept notices or summonses or other process for or on behalf of said corporation.

“That E. C. Mack, party to whom plaintiff herein caused certain papers herein to be mailed in the State of California, is not now, was not on the 1st day of March 1932, nor has he ever been prior to or since said date, an officer or agent of Defendant Corporation above named. That said Mack is a traveling salesman only, having no connection with Defendant other than soliciting orders for its products on a commission basis and that he travels in States other than California, including Washington and Oregon.” (Tr., pp. 55 and 56).

(4) Affidavit of Fred D. Morgan, Secretary and General Manager of Liquid Veneer Corporation:

“That said Corporation has not now nor did it have prior to, since or on March 1st, 1932, the date upon which papers herein were mailed to the Secretary of State of California as deponent is informed, an office or place of business anywhere within the State of California; that it had no officers or agents in the State of California or elsewhere during any of said times mentioned; that it had no property, either real or personal in said State of California during the times mentioned excepting occasional merchandise in transit; that at no time has the Defendant above named ever designated any person or persons, firm, or corporation upon whom process could

he served within the State of California or elsewhere.

“That at no time has the Defendant Corporation ever filed its Articles of Incorporation with the Secretary of State of California or made any effort to qualify itself to transact business within the State of California and that it has never designated, appointed, authorized or otherwise empowered, the Secretary of State of the State of California, E. C. Mack or any other person or persons, or any firm or corporation within said State of California to receive or accept notice or summonses or other process for or on behalf of said corporation.” (Tr., pp. 58 and 59.)

(5) Affidavit of E. C. Mack, salesman for Liquid Veneer Corporation on the Pacific Coast:

“That he is now and for some time has been a traveling salesman, his territory comprising the Pacific Coast area, which includes the States of Washington, Oregon, Nevada, Montana, Idaho and Northern California. That his duties are confined entirely to soliciting, within said territory, orders for the manufactured products of Liquid Veneer Corporation, of the City of Buffalo, State of New York, defendant above named, said orders being forwarded for acceptance by the said corporation at its Home Office in the City of Buffalo. That no sales are or have been made by affiant of any of defendant’s goods, wares or merchandise within the State of California, affiant merely soliciting orders for defendant’s manufactured products, which orders, as aforesaid, are transmitted to defendants at its home office in the City of Buffalo for acceptance.” (Tr., p. 63.)

(6) The record clearly shows that service on E. C. Mack would have been improper and ineffective:

Obviously, the only possible capacity (under Section 406a of the *Civil Code of California*) that E. C. Mack could have according to the defendant's own contention is that of "general manager." The California cases have clearly held that by general manager is meant one who is empowered to perform any act which a corporation itself could lawfully perform and that he must be a genuinely binding executive of the corporation. Before the 1931 change of this quoted section, instead of general manager, appeared the term "managing agent." The obvious purpose of the change was to make it ineffective simply to serve a salesman, a solicitor or even an agent if he was not in fact empowered with full authority to be the corporation's general manager.

See *Greve v. Taft*, 101 Cal. App. 343.

Defendant has again fallen into the error of confusing the status of a foreign corporation's representative for different purposes. Although obviously E. C. Mack was an agent or representative of the Liquid Veneer Corporation, when the question of "doing business" in the State of California is concerned, yet just as obviously he could not be considered a "general manager" for the purposes of having service made upon him. With this state of facts therefore, it would have been foolhardy for the plaintiff to have simply relied upon serving E. C. Mack. Plaintiff followed the statute implicitly and served the Secretary of State and simply designated E. C. Mack

as the Pacific Coast Representative of the Liquid Veneer Corporation.

Summary

Can there be any fair doubt about the true situation? At the time appellant first moved to quash the summons, no idea was entertained whatever about the validity of the service. Every effort was made to show that defendant had no agent—serviceable or otherwise—in California, in order to try to convince the Court that appellant was not “doing business” in this state.

For the first time, after judgment, and in connection with its motion for new trial, defendant endeavored to seriously press this point. Then to conclusively demonstrate defendant’s incalculable ability to blow hot and cold as the exigencies of the moment demand, defendant *attempted to completely withdraw its motion to dismiss on the grounds of improper jurisdiction.* (Tr., p. 239.)

We have taken more pains with this discussion than its lack of merit deserves, but we have done so to demonstrate the studied efforts of defendant to build up straw men so as to be able to knock down an imposing number of them.

The undue length of defendant’s “Brief” which must be a burden both to this Honorable Court as it certainly is to plaintiff, is due in large measure to the further repetition by defendant of this same method of argument.

III.

**THE LIQUID VENEER CORPORATION WAS
“DOING BUSINESS” IN THE STATE OF
CALIFORNIA AT THE TIME THAT SERV-
ICE OF PROCESS WAS MADE.**

As we have earlier indicated, the whole ponderous argument of defendant regarding alleged improper service of process was strictly on its relative importance entitled to very little attention, because after all, having appeared and defended, the only *sine que non* of the Court having fully acquired jurisdiction is whether or not the defendant was at the time it was served with process “doing business” in the State of California. We quite agree with counsel for defendant that if it was not “doing business” in California at that time, the District Court would have had no jurisdiction regardless of how the Secretary of State were served. And it is equally as true that if the defendant corporation was “doing business” in California at that time, the cause of action having arisen in California and the defendant being before it, the District Court indisputably acquired that jurisdiction over person and subject matter which is necessary to sustain the judgment.

We believe that it will lead to clear thinking if we first set out the applicable rules of law governing the principles of jurisdiction over a foreign corporation based upon that corporation “doing business” within the forum. With the law simplified and clarified, we feel that it will be a simple matter to apply that law to the proved facts in this case, and consequently to effectively convince this Honorable Court that the trial court properly held that there was jurisdiction.

(a) Clarification of the Applicable Law

[1] Cases defining what is "doing business" for the purpose of a foreign corporation qualifying to meet statutory requirements for "doing business" in a state, or for purposes of interpreting licensing and tax statutes, must be separated from those cases defining what is "doing business" for purposes of acquiring jurisdiction over a foreign corporation in case of suit against it.

For thirty pages in its Brief defendant has expounded its version of the law relative to service of summons upon foreign corporations "doing business" within the state of the forum. We have studied this Brief carefully and feel that counsel for the defendant has fallen into the very painless error of lumping together all kinds of decisions without properly segregating them. The law of "doing business" is conflicting and confusing unless proper segregation of the cases is made.

Fletcher, probably the country's most eminent commentator on the law of corporations, in his *Cyclopedia of Corporations* has stated the cause of confusion in very clear language. He says:

Fletcher Cyc. Corp., Vol. 17, §8465, pp. 468 and 469:

"It may be observed here, however, that the business activities of a foreign corporation in a state may be of such a nature as to render it amenable to service of process in an action brought against it in the state, and yet not be sufficient to render it necessary for the corporation to qualify under the requirements of a statute imposing conditions and restrictions upon the right to do business in the state. In reaching their decisions as to what shall constitute

doing business within the terms of the latter acts, the courts are naturally inclined to be liberal on the side of the corporation, since severe penalties for noncompliance are frequently imposed, whereas the interests involved when a question of the sufficiency of service of process is raised are of a different nature. In view of the hardship which might result from the failure to uphold the jurisdiction, the tendency has been to assign a broad meaning to the term 'doing business' and to adopt a narrow standard as to what volume of business shall be necessary to bring the corporation within the term as used in acts relating to process upon foreign corporations."

Again, in *Fletcher Cyc. Corp.*, Volume 17, §8712, pp. 339, 340, 341, 342:

"It has been indicated heretofore that a distinction has been observed in this work and by the cases in determining on the one hand the nature and extent of the activities of a foreign corporation in a state to subject it to service of process therein on the ground that it is 'doing business' there, and the rules applied in construing the terms 'doing business' and 'transacting business' in qualifying statutes, and license and tax laws. As the courts have said in a number of decisions: What is meant by doing business in a given state or other locality is something approached from so many angles that the subject appears a mass of confusion. 'Doing business' for purposes of taxation; doing it within a statute requiring licenses, and doing enough business to justify the service of process are quite different things. The use of the same phrase makes confusion. That is to say, one of the causes of the confusion and lack of harmony in the cases is that the test of doing busi-

ness has been variously applied to three different legal purposes: (1) The necessity of a license under the licensing statutes; (2) the liability to a tax on corporate activities; (3) the subjection to service of process. Some courts have stated broadly that a foreign corporation may be doing business within a state to such an extent as to be liable to taxation or other undue burdens upon interstate commerce. The distinction between presence of a foreign corporation for service of process because doing business even exclusively interstate in nature, and its absence for purposes of taxation although doing such business, is well established. In a ruling American case the court said that 'where a foreign corporation is, in fact, doing business in the state, as that term is understood, it is immaterial what the commerce may be; they are 'here' within our jurisdiction. Decisions relating to taxing, licensing, or to state laws that impede the free flow of interstate commerce do not control the question of service of process.'

"The distinction between the classes of cases is aptly summed up as follows: 'The business which must be transacted by a foreign corporation to permit service of process must be such as to warrant the inference that the corporation is present. To subject such a corporation to taxation for doing business, the transactions must not only show that the corporation is present, but also that it is active. In order that qualification be rendered necessary, the corporation must not only be present and active, but its activity must be continuous.'

"'It does not follow that statutes fixing the conditions under which a foreign corporation may engage in business in a state are to have the same construction as statutes permitting a foreign corporation

to be served in a state where it may be found. In the former it is, of course, a more or less continuing course of business which is meant to be regulated, whereas in the latter the object sought is only to give notice to a corporation of a pending action. The tendency is to hold that whatever is reasonably effective for this purpose is a good service.'

"Accordingly whether a foreign corporation is doing business in the state so as to be subject to process in an action against it is distinct from the question of whether it is doing business in the state so as to bring it within the scope of a statute requiring foreign corporations doing business in the state to comply with certain prescribed conditions. For activities insufficient to make out a transaction of business, within the meaning of such a statute, may yet be sufficient to bring the corporation within the state so as to render it amenable to process. For example, 'doing business' to bring an alien corporation within the jurisdiction of the lower courts, does not mean that the corporation must maintain such a relation to 'doing business' in the state as to bring it within the statutory provision requiring a license for such operation. And cases involving motions to quash the service of process upon a foreign corporation are not controlling in the construction of statutes and constitutions requiring every foreign corporation 'doing business' in a state to file a copy of its charter with a designated officer."

Vicksburg, S. & P. Ry. v. De Bow, 148 Ga. 738, 98 S. E. 381, 384:

"As pointed out in *Kendall v. Orange Judd Co.*, 118 Minn. 1, 136 N. W. 291, the question as to whether a foreign corporation is doing business in

the state, so as to be subject to the jurisdiction of the courts of the state, is entirely distinct from the question as to whether such a corporation is 'doing business' in the state within the purview of the act prescribing the conditions upon which corporations may be allowed to do business within the state, and that it does not follow that business which, by reason of the interstate commerce law, does not bring the corporation within the latter statute, may not nevertheless bring it within the statute providing for the service of process. A long line of cases, from probably every state of the Union, might be cited, in which a foreign corporation has been held not to be doing business within the state, so as to subject it to the requirements imposed upon such corporations doing business within the state. Where the interstate commerce law is the basis of the decision, this fact must be kept in view. See *Auto Trading Co. v. Williams* (Okla.), 177 Pac. 583."

Webster v. Doane, 137 Misc. 513, 241 N. Y. Supp. 242:

"In New York 'activities within this state, sufficient to constitute doing business within it, so as to render a foreign corporation amenable to process, yet may be insufficient to amount to doing business in the state, within the meaning of sections 15 and 16 of the General Corporation Law.' *Pittsburgh & Shawmut Coal Co. v. State*, 118 Misc. 50, 192 N. Y. Supp. 310. Activities of a foreign corporation in a state may be sufficient to make it amenable to service of process, though not constituting the doing of business within N. Y. Stock Corp. Law, and kindred statutes, relating to authority of foreign corporation."

With this cause for confusion and conflict now understood, we can state four primary rules which are well settled and which when applied to the facts in our case, clearly establish that the Liquid Veneer Corporation was and is doing business within the State of California.

[2] In spite of confusion and looseness of thought, the following rules have evolved as firmly established:

RULE 1.

A foreign corporation may be present in California sufficiently to make it amenable to our process even though if tested by other rules its business is entirely interstate.

Fletcher Cyc. Corp., Vol. 18, p. 345, Footnote 94:

“The presence of a foreign corporation within the state, such as is necessary to the service of process upon it, is shown when it appears that the corporation is there carrying on business in such a sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. *Southeastern Distributing Co. v. Nordyke & Marmon Co.*, 159 Ga. 150, 125 S. E. 171, 174; *Scene-in-Action Corp. v. Knights of Ku-Klux-Klan*, 261 Ill. App. 153, 157.”

Also on the same point see *Vicksburg, S. & P. Ry. v. De Bow* (*supra*).

Also see *George A. Hormel & Co. et al. v. Ackman*, 158 So. 171:

“The fact that corporate business is interstate in character does not immunize the corporation from service of process in state courts.”

See, also, *Knapp v. Bullock Tractor Co.*, 242 Fed. 543 (Sou. Dist. of Calif.):

“Without in any wise, attempting to refer to these authorities, it suffices to say that, since the decision in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 587, 34 Sup. Ct. 944, 58 L. Ed. 1479, the fact that a foreign corporation may be engaged in interstate commerce does not in any wise serve to render it immune from the assertion of jurisdiction by the state courts in any state in which it may be engaged in doing business, and in which appropriate provision is made by the law thereof for the assertion of jurisdiction over it. *Atkinson v. U. S. Operating Co.*, 129 Minn. 232, * * *; *Armstrong Co. v. N. Y. Central*, 129 Minn. 104, * * *; *L. R. A.* 1916E, 232, *Ann. Cas.* 1916E, 335.”

RULE 2.

Even if a foreign corporation limits its activities within the state of the forum, to soliciting orders for merchandise by its agent or agents, it is doing business within the state for the purposes of amenability to civil process if such solicitation is a continuous part of its business and is not just occasional or done in a single instance.

Fletcher Cyc. Corp., Vol. 18, pp. 379 to 382:

“But the solicitation and forwarding of orders may constitute doing business, if a continuous and permanent course of business; a continuous and permanent business within the state, though consisting only of soliciting orders, is doing business. The rule has been laid down by the United States Supreme Court that where there is a continuous course of business in the state by the solicitation of orders

which are sent to another state, in response to which the subject matter thereof is delivered in the state where the order was taken and payment is received therein by money, notes, or checks, this constitutes doing business in such state, rendering the corporation subject to the process of its courts. The leading cases decided by the Federal Supreme Court upon this point are the so-called Green and Harvester cases. 'Possibly the maintenance of a regular agency for the solicitation of business will serve without more.'

"The tendency of the courts in recent years seems to be toward considering agents engaged in soliciting business as the representatives of the corporations for the purpose of the service of process. And in some states it is provided by statute that a foreign corporation engaged in 'soliciting business' shall be subject to the local jurisdiction."

See also *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, which follows the leading case of *International Harvester Co. of America v. Kentucky*, 234 U. S. 579, and where it is held that a foreign corporation that for many years has been engaged in a systematic and continuous course of business in the solicitation of orders, and the delivery and shipment of merchandise to numerous customers, is doing business within the state.

International Harvester Co. of America v. Kentucky, 234 U. S. 579, 58 L. Ed. 1479, 34 Sup. Ct. 944:

"As we have said, we think it was. Here was a continuous course of business in the solicitation of orders which were sent to another state, and in

response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state. It is agreed that this conclusion is in direct conflict with the case of *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, 27 Sup. Ct. Rep. 595. We have no desire to depart from that decision which, however, was an extreme case."

The court then distinguishes the earlier case of *Green v. Chicago, B. & Q. R. Co.*, in 205 U. S. 530. This Honorable Court should note that the defendant in its brief relies strongly upon this *Green* case which is for practical purposes overruled by the *International Harvester* case.

See also:

Berryman v. The Cudahy Packing Company, decided November 26, 1934, Commerce Clearing House Court Decisions Reporting Service, Requisition No. 126800.

Summary:

"One Westerfield is employed by the Cudahy Packing Company, on salary. He lives in Arkansas, has an office there, and occupies himself in several coun-

ties of the state on behalf of his employer. He takes orders and makes collection. A small proportion of his customers remit direct to the company. On occasion a customer refuses to accept a shipment; in such a case Westerfield picks it up and transporting it in his own car (for the use of which the company pays him 4¢ a mile) sells the merchandise to another customer. New customers are sought, the extent of credit being recommended by Westerfield. The Arkansas Supreme Court, reversing the court below, holds that the company is doing business in Arkansas, and that Westerfield is more than a mere salesman but is an agent, because of his duties and functions and so that service on him on behalf of the company is valid service."

(a) There is, therefore, no conflict of opinion at all that where the orders of the foreign corporation's agent who solicits these orders are not subject to approval by the Home Office, the foreign corporation is "doing business" within the states where the orders are solicited.

In our own case, it will be easily seen later on that the orders either personally solicited by E. C. Mack, the defendant's California representative, or sent to him by California customers or else sent directly to the warehouse in San Francisco, WERE FILLED IN CALIFORNIA without the necessity of having the orders first approved by the Home Office of the Liquid Veneer Corporation at Buffalo, New York.

(b) Even where the order solicited in the state must first be approved by the Home Office outside of the state, there is considerable authority to the effect that the

foreign corporation would be considered as doing business in the state where the orders are solicited.

Alley v. Bessemer Gas Engine Co., 262 Fed. 94, (following *International Harvester Co. of America v. Kentucky* [supra]):

“A foreign corporation soliciting orders through a local salesman, shipping machines in response to the orders, after approval at the home office, and collecting for the shipments in the foreign state through its local salesmen, is doing business in the state, so as to be subject to service of process.”

See also: *Bogert & Hopper v. Wilder Mfg. Co.*, 197 App. Div. 773, 189 N. Y. Supp. 444, where it was held that a foreign corporation is doing business in a state where it exhibits goods at a fair held in the state and there takes orders for the sale of goods which are transmitted to its home office.

This Honorable Court should be especially receptive to the ruling of California Courts upon this question.

The case of *Milbank v. Standard Motor Const. Co.*, 132 Cal. App. 67, 70, should, therefore, be especially persuasive. In that case the Standard Motor Construction Company, a New Jersey corporation, was engaged in selling some of its engines in California. A certain engine when purchased by Milbank and after being installed in his boat developed mechanical defects. Upon complaint being made, the defendant corporation notified Milbank that it was sending a Mr. Runyon, a graduate engineer, as its representative, to aid and assist the customers in California with the maintenance and service of engines there-

tofore delivered in California. Mr. Runyon was not an officer or stockholder of the defendant corporation and was not authorized to sign and execute contracts. He did, however, have conferences with Milbank for the purposes of adjusting the differences between Milbank and the company.

“The defendant first contends that the judgment is void because it is not so far engaged in doing business in this state as to be subject to the jurisdiction of its courts. The authorities, both state and federal, have found difficulty in laying down an all-embracing rule as to what constitutes ‘doing business’, and many instances of irreconcilable conflict have arisen. It has been held by numerous cases, however, that in order for a foreign corporation to be doing business within the state it must transact here some substantial part of its ordinary business by its agents and officers selected for that purpose. (*Davenport v. Superior Court*, 183 Cal. 506 [191 Pac. 911]; *Walton N. Moore Dry Goods Co. v. Commercial Industrial Co.*, 276 Fed. 590, 594; *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.) The phrase ‘doing business’ is equivalent to the words ‘transacting business’ and has reference to a continuation in some form of business, but ordinarily does not apply where a corporation does only a single act of business within the state. (*General Conference of Free Baptists v. Berkey*, 156 Cal. 466 [105 Pac. 411].) There must be the carrying on of business to such an extent by the corporation as to manifest its presence in the state even though the transactions are entirely interstate in character. (*International Harvester Co. v. Kentucky*, 234 U. S. 579 [34 Sup. Ct. 944, 58 L. Ed. 1479, 1483].)

“Directing our attention to the activities of defendant in this state, we are of the opinion that they were sufficient in character to constitute ‘doing business’ for the purpose of the service of summons. The continuous endeavor to service the engines of customers in order to correct their mechanical defects and increase their efficiency was a substantial and important branch of its ordinary business. It is apparent that the maintenance of such a service does not logically fall within the category of a merely casual or incidental activity of defendant. *Cone v. New Britain Machine Co.*, 20 Fed. (2d) 593, 595; *Beach v. Kerr Turbine Co.*, 243 Fed. 706.)

The Honorable Court should also give persuasive effect to a decision of a Judge of the Southern District of California who in the case of *Knapp v. Bullock Tractor Co.* (supra), laid down this very sensible general rule:

“The general consensus of opinion is that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state.

“Just what may be meant in that statement by the phrase ‘some substantial part of its ordinary business’ is perhaps indefinite; but I think, upon reason and authority, it may be said that if the corporation is engaged in a more or less continuous effort, not merely casual, sporadic, or isolated, to conduct and carry on within the state some part of the business in which it is usually and generally engaged, it may

be said with due and becoming propriety to be 'doing business' within such state. (Cases cited.)"

RULE 3.

Although it is generally held that where a foreign corporation's agent within the state merely solicits orders, and merchandise is then sent directly from out of the state to the customers direct or to the agent to be delivered to the customers, said shipment taking place after the solicitation of the orders and solely to fill the orders, that the foreign corporation is not doing business within the state.

Yet, it is uniformly held that where the foreign corporation maintains a stock of merchandise within the state not only for the purpose of filling immediate present orders exclusively, but from which stock future orders may be filled, then the foreign corporation is doing business in the state because by maintaining its stock in the state, it is transacting business within the state and is present therein, and is not merely shipping merchandise in interstate commerce.

The general rule is stated by Fletcher, as follows: (*Fletcher Cyc. Corp.*, Vol. 18, p. 398):

"Thus where a foreign corporation maintains a stock of goods on the premises of, and in charge of, a domestic warehouse company, and furnishes such company a credit list authorizing it to allow certain customers to withdraw goods on their own written orders, and the company notifies the foreign corporation of the details of its delivery of goods to customers, and the customers are billed directly from the home office of the foreign corporation, and its

activities on its behalf constitute doing business in the state by the corporation, and service of process on the warehouse company is service on the corporation, and this is so though the warehouse company functions in a similar way for others and disclaims the agency.”

See also to the same effect:

Cunningham v. Mellin's Food Co. of North America,
121 Misc. 353, 201 N. Y. Supp. 17.

A most important case which is almost directly in point with our facts, is that of *Kerr Glass Manufacturing Co. v. Superior Court*, 6 Pac. Rep. (2d) 368, 166 Wash. 41:

“We shall refer to that defendant as the relator herein.

“(1) Relator is a Nevada Corporation, manufacturing fruit jars and caps, having its factory and principal office at Sand Springs, Okla. It is not qualified to do business in this state, and maintains no office, factory, warehouse, or other establishment in Washington. It is not listed in any city directory or telephone book.

“A. J. Huch, an employee of the relator, makes his home in the state of Washington, and represents relator in Western Washington, British Columbia, Alberta, Saskatchewan, and part of Manitoba, Canada. Huch agrees with relator in its contention that he is not relator's agent. He secures, but does not accept, orders for relator's products from prospective purchasers, principally wholesalers and some chain stores; such orders being subject to approval and final acceptance by relator at its home office in Oklahoma. Relator completes delivery when the

products are turned over to the transportation company in Oklahoma. Bills of lading, invoices, and statements are sent from relator direct to the buyer. Remittances are made direct from buyer to seller. Huch makes no collections, and has nothing to do with extending credit.

“Huch also calls on retailers, to whom he does not sell, and encourages the use of relator’s products. Certain seasons relator sends men into the territory to help Huch in cultivating retailers. They create demands for relator’s products, and pass orders along to the wholesaler designated by the retailer. These men are hired in Oklahoma, are paid from there, and report to the home office. Huch gets a copy of their reports, and directs their efforts while there.

“Huch reports daily to Oklahoma, and is paid from there. Relator keeps no bank account in this state.

“Sometimes relator, in order to secure carload rates for the buyer, completes a carload with merchandise not yet actually ordered, and this is placed in a warehouse and sold, subject to confirmation of the sales by the home office. At the time this matter was pending before the lower court, relator had such merchandise in storage in this state. Some of the goods had then been in the warehouse for three months. Sometimes the goods are kept in a warehouse in this state for more than three months. Such excess shipments are received in this state approximately two or three times a year. When goods are sold from such stored excess shipments, a requisition upon the warehouseman is filled out and pinned to the order, which is sent to the home office for approval.

“The principal question before us is whether or not under these circumstances, relator is doing business in the state of Washington.”

The Court on these facts held that the foreign corporation was doing business in the State of Washington.

Saying further:

“In the case before us relator kept some goods in storage in the state of Washington for the purposes of sale, keeping them for long periods as often as two or three times a year. It is true relator did not at all times keep goods in this state for purposes of sale, as was the situation in the case of *Grams v. Idaho National Harvester Co.*, 105 Wash. 602, 178 P. 815, where it was held that the corporation there concerned was doing business in this state. It is likewise true that such goods were disposed of, like all other goods handled by Huch, by securing offers to buy, which did not constitute sales until accepted by the home office. Requisitions upon the warehouse for the goods in storage were attached to the order blanks and sent back to the office in Oklahoma.

“However, we think it can be fairly said that Huch’s course of conduct, taken into consideration with the disposal of the goods shipped into this state before they were sold and held here, under the protection of the state government, awaiting sale, made manifest the presence of relator in this state. We think the conduct of Huch, in connection with that of the relator, constituted a course of business, and not a series of isolated transactions.

“True, it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce;

but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. * * *

“We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character.”

RULE 4.

Whether or not a foreign corporation was “doing business” within the state at the time of service of process is a question of fact and each case must be decided on its own facts.

St. Louis Southwestern Railway Company v. Alexander, 227 U. S. 218, 57 L. Ed. 486, (Per Mr. Justice Day):

“This Court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the ‘doing of business by a foreign corporation in such a manner as to subject it to a given jurisdiction.’ ”

24 *Mich. Law Review*, 633, 639, (By Professor Maxwell E. Fead):

“The Courts have consistently refused to give any set definition as to what constitutes doing business in the state, wishing to decide each case upon its facts.”

Fletcher Cyc. Corp., Vol. 17, Chap. 67, §8502, p. 555:

"It was observed earlier in this subdivision that the question of whether a foreign corporation is doing business in the state within the terms of its regulatory laws is mainly one of fact. Various acts and transactions supporting an inference, or evidencing the fact, that the foreign corporation was doing business in the state have been set forth in the preceding sections. The province of the court and jury in passing on the issue as to whether the foreign corporation is doing business in the state is the same as in jury cases generally. If the facts relating to the doing of business are undisputed and the inference to be drawn from them is so obvious as to leave no issue for the jury, the question is one of law for the court; but where the evidence upon the point is conflicting so that reasonable minds might draw different conclusions therefrom, it is for the jury under proper instructions from the court."

Citing:

Meade Fibre Co. v. Varn, 3 F. (2d) 520;

Chase Bag Co. v. Munson Steamship Line, 295 Fed. 990;

Cannon Mfg. Co. v. Cudahy Packing Co., 292 Fed. 169, aff'd 267 U. S. 333, 69 L. Ed. 634, 45 Sup. Ct. 250;

Empire Fuel Co. v. Lyons, 257 Fed. 890, certiorari denied 252 U. S. 582, 64 L. Ed. 727, 40 Sup. Ct. 393;

Hayes Wheel Co. v. American Distributing Co., 257 Fed. 881, certiorari denied 250 U. S. 672, 63 L. Ed. 1200, 40 Sup. Ct. 13;

Bellefield Co. v. Carleton Investing Co., 228 Fed. 621;

National Mercantile Co. v. Watson, 215 Fed. 929,
appeal dismissed 219 Fed. 1022;

Audenried v. East Coast Milling Co., 124 Fed.
697;

Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118
Fed. 239.

See also: *Fletcher Cyc. Corp.*, Vol. 17, Chap. 67, §8464,
pp. 465, 466:

“Otherwise the question is ordinarily one of judicial determination and primarily one of fact. All the combined acts of the foreign corporation in the state must be considered, and every circumstance is material which indicates a purpose on the part of the corporation to engage in some part of its regular business in the state. In consequence, it is difficult and perhaps impossible to lay down any rule of universal application to determine when a foreign corporation is doing business in a particular state within the purview of the provisions in question. Each case must turn upon its own peculiar facts and upon the language in which the applicable constitutional or statutory provision is couched.”

14a *Corpus Juris*, §4154, p. 1422;

14a *Corpus Juris*, §4073, p. 1367.

(b) The Facts in This Case as Found by Both Court and Jury, Clearly Establish That Defendant Was “Doing Business” in This State at the Time When Process Was Served Upon it.

With these rules of law fresh in our minds, this Honorable Court should find no difficulty in interpreting the true facts in this case.

Let us remind the Court that the *question of fact* as to whether defendant corporation was “doing business” in California at the time of service of process, has been passed upon favorably towards retention of jurisdiction on *three different occasions*, during the pendency of this litigation.

[1] If only the evidence produced at the preliminary hearings on the motion to quash heard prior to the date of trial are considered, the record is nevertheless sufficient to sustain jurisdiction.

Immediately after having the case removed from the State to the Federal Court, defendant raised the question of jurisdiction, by way of a motion to quash summons.

At that time, as well as throughout the proceedings,

“the burden of proof is on the corporation to defeat jurisdiction by showing that service of summons on it did not confer jurisdiction on it because it was not doing business in the state when served.”

Scene-in-Action Corporation v. Knights of Kluk-Klan, 261 Ill. App. 153, 158;

Wiley Electric Company v. Electric Storage Battery Company, 167 Miss. 842, 147 So. 773 at 777.

In support of its motion to quash summons, defendant filed various affidavits, to-wit:

(1) Affidavit of Robert V. Jordan, Assistant Secretary of State of California, to the effect that the Liquid Veneer Corporation had never legally qualified to do business in California by filing Articles of Incorporation, etc., nor had it designated a statutory agent to receive service of process. (Tr., pp. 54 and 55.)

(2) Affidavit of Martin J. Cabana, Executive Vice-President of Liquid Veneer Corporation, to the effect that defendant never engaged in business in California; that it never designated anyone to accept service for it in California; that it has never filed its Articles of Incorporation, etc., with state authorities in California; that on March 1st, 1932, the date when the corporation was served by serving the Secretary of State, E. C. Mack was only a traveling salesman, working on commission for the defendant and was not authorized to accept service of summons on its behalf; that defendant shipped all merchandise direct to customers from Buffalo, except where it was necessary to redistribute goods by public warehouse forwarders "when previously bulked for freight economy on transcontinental journey." (Tr., p. 55, et seq.)

(3) Affidavit of Fred D. Morgan, Secretary and General Manager of Liquid Veneer Corporation, essentially identical with affidavit of Martin J. Cabana. (Tr., p. 58, et seq.)

Plaintiff at this point maintained that the District Court (as well as the State Court from which defendant had removed the case) properly had jurisdiction over the defendant and the subject matter of the case within the rule of law which we have carefully outlined above, namely, *that a foreign corporation is doing business within a state if it maintains a stock of merchandise within the state not only for the purpose of filling immediate present orders exclusively, but from which stock of merchandise future orders may be filled, because in maintaining its stock of merchandise in the state, the foreign*

corporation is transacting business within the state and is present therein and is not merely shipping merchandise in interstate commerce.

Consistent with this principle, therefore, plaintiff filed two affidavits in opposition to the affidavits of the moving party, namely, as follows:

(1) Her own affidavit dated May 17th, 1932, to the effect that she personally saw a stock of merchandise belonging to the defendant Liquid Veneer Corporation at the premises of the Hazlett Warehouse Company, formerly known as the Lawrence Warehouse Company at 285 Brannan Street, San Francisco; that she saw orders in the possession of said Hazlett Warehouse Company executed by the Liquid Veneer Corporation ordering said warehouse company to ship merchandise out of the stock on hand to various concerns in the State of California; that E. C. Mack, the defendant's representative, has called on her numerous times as agent for the defendant and had endeavored to adjust differences that have arisen between her and the company and that innumerable orders for the merchandise of the defendant ordered by concerns in Los Angeles were filled from the above mentioned stock in San Francisco. (Tr., p. 61.)

(2) The affidavit of Elijah M. Smuckler (plaintiff's son and since deceased) in effect as follows:

“that his investigation showed that the defendant herein keeps goods, wares and merchandise stored with a public warehouse in the City of San Francisco known as the Haslett Warehouse Co., formerly the Lawrence Warehouse Company, at its warehouse No. 19, located at 285 Brannan Street, San Fran-

cisco, California; that said Haslett Warehouse Co., formerly Lawrence Warehouse Company, is a public warehouse and that said goods, wares and merchandise belonging to the defendant herein are held at said warehouse subject to the order of the defendant herein; that said merchandise is shipped out on orders received by the defendant herein subsequent to the time that said merchandise is placed in said warehouse." (Tr., p. 62.)

Defendant then filed in reply to these two affidavits the following further affidavits:

(1) Affidavit of E. C. Mack, essentially as follows:

"That he is now and for some time has been a traveling salesman, his territory comprising the Pacific Coast area, which includes the States of Washington, Oregon, Nevada, Montana, Idaho and Northern California. That his duties are confined entirely to soliciting, within said territory, orders for the manufactured products of Liquid Veneer Corporation, of the City of Buffalo, State of New York, defendant above named, said orders being forwarded for acceptance by the said corporation at its Home Office in the City of Buffalo. That no sales are or have been made by affiant of any of defendant's goods, wares or merchandise within the State of California, affiant merely soliciting orders for defendants manufactured products, which orders, as aforesaid, are transmitted to defendants at its home office in the City of Buffalo for acceptance.

"Deponent further states that he never called upon Lena G. Smuckler for the purpose of selling her any goods, wares or merchandise of the defendant corporation; that deponent has never had any con-

versations with Lena G. Smuckler in any representative capacity or under any authorization of the defendant corporation.” (Tr., pp. 63 and 64.)

(2) The further affidavit of Fred G. Morgan which refers to the affidavit of plaintiff and substantially affirms the affidavit of E. C. Mack. (Tr., pp. 64 and 65.)

The matter was submitted and an order which was inadvertently entered granting the motion to quash, was on December 12th, 1932, vacated and briefs were ordered filed (Tr., p. 66.)

While this motion was still under advisement, plaintiff moved to reopen the matter for the purpose of presenting oral and documentary evidence in further opposition to the motion of defendant. Plaintiff's request was granted and on May 13th, 1933, further proceedings took place, as follows:

(1) Robert H. Breckenridge was called as a witness for the plaintiff. Defendant objected to his testimony upon the ground that he was not within the motion or the order reopening the proceedings upon the motion to quash, for the reason that said notice simply named Miss E. Kaster, Mr. W. E. Max and Mr. E. C. Mack. (Tr., p. 69.)

This same objection is now again referred to by defendant as one of the assigned errors. (App. Br., pp. 99-100.)

We know of no law—nor has defendant cited any—which delimits a motion to reopen proceedings to the identical witnesses named in the motion to reopen. It

was not necessary that any witnesses be named in the motion; in the absence of a showing of surprise or fraud, it certainly is within the sound discretion of the trial judge to proceed with a motion to reopen proceedings as he sees fit. Be that as it may, an order was specifically made at the end of this hearing of May 13th, 1933, continuing the hearing to May 29th, 1933, for the obvious purpose of permitting the defendant to produce further testimony which it actually did in the form of two additional affidavits. (Tr., p. 82, et seq.) Defendant's objection, therefore, certainly comes with little grace and questionable sincerity in view of this order.

Returning now to the testimony, Mr. Breckenridge testified that he was Assistant Controller for the May Company, a large department store in the City of Los Angeles; that he is in charge of its records, and that he has brought with him certain records relating to transactions between the May Company and the defendant corporation.

After being properly identified, there were then received in evidence photostatic copies of invoices, as follows:

Plaintiff's Exhibit 1, invoice of Liquid Veneer Corporation, dated July 7th, 1932, showing sale to May Company of a certain quantity of Liquid Veneer products to be shipped by Wabash and Santa Fe Railway systems and indicating at the bottom of the invoice "Balance of order shipped from warehouse." [We remember, of course, that it was uncontradicted that defendant maintained a warehouse in San Francisco.] (See Exhibit 1, Tr., opposite p. 69.)

Mr. Breckenridge then testified that the balance of this order recited in Exhibit 1, was actually received from the warehouse in San Francisco several days later. As is indicated by plaintiff's Exhibit 2 (Tr., opposite p. 70) which recites "shipped from warehouse at San Francisco, California" via Pacific Steamship Company.

Further, to verify this shipment from San Francisco, plaintiff introduced as Exhibit 3 (Tr., opposite p. 70), the freight bill showing shipment of this same merchandise from Lawrence Warehouse Company at San Francisco via Pacific Steamship Company and in Los Angeles via Pacific Electric Railway Company.

Still, another invoice (Plaintiff's Exhibit 4, Tr., opposite p. 70) dated April 13th, 1932, stated "balance of order shipped from warehouse", and the actual balance of the order was delivered to the May Company from the San Francisco warehouse on April 18th, 1932, via Pacific Steamship Company on an invoice for the balance dated April 15th, 1932, and on a freight bill dated April 15th, 1932. (Tr., opposite p. 71.)

This same type of transaction was emphasized by plaintiff's Exhibit 7 and Exhibit 8 (Tr., opposite p. 71), or as Mr. Breckenridge summarizes the situation:

"To sum it up all of the invoices were received from Buffalo, New York, and some of the goods filling the invoices were received from Buffalo and some from San Francisco.

"I made no search of our records in back of the dates of these documents and do not know whether there are any similar invoices older than the oldest date of these invoices. May Company has been deal-

ing with the Liquid Veneer Corporation for a matter of about 5 or 8 years. There has been no change in the general method of transacting business with Liquid Veneer Corporation on the part of the May Company." (Tr., pp. 71 and 72.)

(2) The next witness called for plaintiff was Mr. Karl S. Nance, an Assistant in the auditing department of Young's Market Company of Los Angeles. He identified two invoices of Liquid Veneer Corporation. One was dated April 30th, 1930, at Buffalo, New York, about which the witness stated: "The merchandise described therein was received from the warehouse at San Francisco, on May 1, 1930." (Plaintiff's Exhibit 9, Tr., opposite p. 72.) The second invoice was dated March 20th, 1931, and was received from Liquid Veneer Corporation at Buffalo, New York, and the merchandise was shipped from the warehouse at San Francisco and received in Los Angeles on *March 17th, 1931*. (Plaintiff's Exhibit 10, Tr., opposite p. 73.) Two freight bills were introduced to show the actual shipments from San Francisco to Los Angeles on these invoices. (Plaintiff's Exhibit 11, and Exhibit 12, Tr., opposite p. 73.)

(3) The third witness called by plaintiff was Miss Emma M. Kaster, employed at the May Company as a demonstrator for Liquid Veneer Corporation and obviously a hostile witness to plaintiff. Miss Kaster testified as far as this issue is concerned, in substance as follows:

"I work under the supervision of Mr. Max, buyer for The May Company, and Mr. Gallivan, of the

Liquid Veneer Corporation, who is in Buffalo, New York. I know E. C. Mack, an employee of Liquid Veneer Corporation, as he hired me. I do not know his address. All I know is that he is connected with the Liquid Veneer, I believe as District Manager. When he comes into the store I have no conversation with him with respect to my duties as demonstrator. Our talk is along a business line of, 'How is business?' 'Selling much?' Just ordinary business conversation takes place. I do not know that he has his headquarters in San Francisco. That is his home. I am paid a straight salary, and commissions if I sell a certain amount, but I have not been selling that much so I do not get any commissions. When we run short of merchandise at the May Company I go to Mr. Max and ask him for an order and the girls in the office write it up. Goods are received as I need it. I do not know where it comes from. I have been at the May Company for 12 years. I first started working for the Liquid Veneer Corporation 7 or 8 years ago." (Tr., p. 74.)

(4) The plaintiff then testified (Tr., p. 76). In the main, she repeated what she had stated in her affidavit originally filed in opposition to defendant's motion to quash when it was first made (Tr., p. 61), namely, to the effect that in the early part of 1932 (just before this suit was filed) she went to the Lawrence Warehouse Company in San Francisco, that she saw merchandise marked "Liquid Veneer" and bills made out to California concerns to whom the merchandise was being shipped.

"I had been a demonstrator in the May Company and the carton in which the merchandise of the

Liquid Veneer Corporation is brought up to the demonstrating floor was similar in character to the cartons I saw in the warehouse. I had a conversation with the bookkeeper at the warehouse.” (Tr., p. 76.)

That she had a conversation with the bookkeeper there who told her that customers could come there and purchase Liquid Veneer and have it shipped to them; that “they have agents here to take orders and ship it direct from the warehouse”; and that “Mr. Mack himself brought all his orders to have them shipped” and that she could purchase Liquid Veneer from them and have it shipped from the warehouse to her address.” On further examination by the Court, plaintiff described in detail the warehouse where she saw the Liquid Veneer products, whom she spoke to, etc. (Tr., pp. 78 and 79.)

On cross-examination by counsel for the defendant, besides repeating her testimony, plaintiff added:

“My best recollection of the time is not that it was in January or February, 1931 or 1932 * * * it was either in 1930 or 1931. I just don’t remember. I could look it up, I didn’t think to look it up.

Q. 1930 or 1931?

A. Yes. I can’t tell you—I couldn’t say to that. I wouldn’t want to say because I just don’t remember.

Q. You were at that time engaged in gathering information as to whether they were doing business in California or not?

A. Yes, sir.

Q. Well, the question of their doing business in California had not arisen at that time, had it?

A. Yes, sir.

Q. Your action was not brought until March, 1932, was it?

A. Well, I was gathering information for it, however, because they had been bothering my sales; they had been bothering my customers, my sales.” (Tr., pp. 80 and 81.)

The hearing was continued to May 29th, 1933, so as to give defendants an opportunity to produce additional testimony. On May 29th, 1933, defendant did file two additional affidavits, to-wit:

(1) The affidavit of Thomas B. Healey, to the effect that he is an officer of Liquid Veneer Corporation, he is familiar with the methods of shipping merchandise, and that in shipping merchandise to the West Coast it is often stored in a public warehouse in San Francisco so as to ship in larger bulk and save freight costs instead of shipping in smaller lots to fill each individual order as it comes into Buffalo; and that all of the business of the defendant is transacted directly from Buffalo. (Tr., pp. 82, 83 and 84.)

(2) The affidavit of Martin J. Cabana, Vice-President in charge of sales of Liquid Veneer Corporation, in which affidavit he (a) repeated in substance the subject matter of Mr. Healey's affidavit; and (b) denied in substance the affidavit and oral testimony of the plaintiff. (Tr., pp. 85, 86 and 87.)

The matter was then submitted and some time later, to-wit, October 7th, 1933, the District Court entered the following order:

“The oral evidence taken is sufficient, being uncontradicted, to show that the defendant was doing business in California.

“Motion to quash is denied with right to defendant to renew the same at the trial. Exception to defendant.” (Tr., p. 87.)

It should be clear by now that even at this preliminary stage the record amply upholds the jurisdiction which the trial court assumed.

We have seen also that the law clearly holds a foreign corporation to be doing business within a state *if it warehouses merchandise within the state not only for purpose of filling existing orders already taken, but in order to have a supply on hand from which to fill orders to be taken in the future.*

Defendant complains bitterly of the type of evidence upon which plaintiff relies: In the first place as we have already seen, the burden of proof was on the defendant as the moving party. It was clearly up to the defendant to prove that it was not doing business in California at the time of service. *What type of evidence did defendant choose to rely on?* The rankest type of evidence namely, ex parte affidavits giving plaintiff no opportunity whatever for cross-examination. Plaintiff on the other hand went beyond the point legally necessary. *She produced oral and documentary evidence.* The photostatic copies of the invoices, bills of lading and freight receipts speak for themselves. They indicate beyond question:

(1) That although the invoices were dated at Buffalo, New York, they were filled in whole or in part from the stock kept at the Lawrence Warehouse Company in San Francisco.

(2) The dates of shipment from San Francisco to Los Angeles when compared with the dates appearing upon the orders as received in Buffalo, *establish conclusively that the merchandise was not shipped from Buffalo to San Francisco and then temporarily warehoused and from there reshipped to Los Angeles so as to fill the given order, but that the orders were actually and immediately filled from the stock of merchandise continually kept on hand in San Francisco.* The invoice dated July 7th, 1932, at Buffalo, showing it to be shipped by Wabash and Santa Fe Railways was actually shipped from the San Francisco warehouse on July 12th, 1932. The invoice dated April 13th, 1932, at Buffalo, New York, and to be shipped via Wabash and Santa Fe actually left the San Francisco warehouse April 15th, 1932; the invoice dated Buffalo, April 30th, 1932, stated on its face that it was going via Pacific Steamship Company but was actually shipped via Pacific Steamship Company from San Francisco the very next day, May 1st, 1932.

This evidence alone is so conclusively sufficient to show that the orders were filled from a standing stock of merchandise in San Francisco, even if we completely eliminate the oral testimony of plaintiff and Miss Kaster, that it comes with little grace from defendant to complain because the District Court denied the motion to quash because he felt that the "oral evidence taken is sufficient,

being uncontradicted to show that the defendant was doing business in California.”

The ex parte affidavits of defendant’s employees in the face of this uncontradicted documentary evidence was given exactly the credence which it deserved—apparently none.

(2) Defendant’s renewed motion to dismiss for alleged lack of jurisdiction made at the beginning and during later stages of the trial was based on more affidavits which added nothing to what had already been heard and passed upon by the trial judge in the preliminary hearing.

On the day of trial, May 7th, 1935, defendant renewed its motion to quash service of summons and to dismiss on the same grounds that it had previously urged. (Tr., pp. 88 to 91.) In support of this motion, there were filed all of the affidavits which defendant had previously filed at the earlier hearings (Tr., pp. 90 and 91), and in addition, six more affidavits, five of them by employees of the Haslett Warehouse Company of San Francisco, formerly known as the Lawrence Warehouse Company, and the sixth, another affidavit by Martin J. Cabana. The general import of all of these affidavits was to attempt to discredit the testimony of plaintiff given at the earlier hearing and to further indicate defendant’s method of doing business so as to show that the warehousing done at San Francisco was only for the purpose of breaking up interstate shipments in transit. (Tr., pp. 92 to 124.)

The Court denied the renewed motion. (Tr., p. 125.)

It would seem strange that with so much at stake, with San Francisco only a few hours away, and with apparently

ample funds at its disposal, defendant still relied entirely upon ex parte affidavits in its attempt to establish that it was not doing business in California in 1932. *The reason that not a single signer of these five additional affidavits of San Francisco employees of the warehouse company were present in Court will become plain later. Suffice it to say that these affidavits were proved to be false and misleading at least in part by subsequent retractions which some of these affiants later made.*

At this point, the documentary evidence which plaintiff had previously produced and which was now expressly made a part of the record at the actual trial (Tr., pp. 205 and 206) still remain the more reliable and convincing evidence. It is submitted that there was little else which the trial judge could properly do except to overrule their renewed motion which he promptly did, and to order that the case be tried on its merits, leaving open the question of no jurisdiction if the evidence during the trial showed that defendant was not actually doing business in California at the time of service of process.

(3) After the jury returned a verdict in favor of plaintiff, the defendant filed at the same time as it filed a motion for new trial, a new motion to dismiss because of lack of jurisdiction.

Now we reach a stage of this case where defendant's position is made to appear very strange to put it charitably.

The verdict was returned on May 9th, 1935. On May 10th, 1935, a judgment in conformity with the verdict was entered and docketed.

On July 9th, 1935, defendant served and filed:

- [a] A motion to set aside the verdict and for new trial;
and
- [b] A motion to dismiss.

The motion to dismiss (as well as the motion for new trial) was made upon the ground of lack of jurisdiction at the time of service of process because (a) the Secretary of State had been improperly served (this is the first time that this point is specifically urged by defendant—after trial and entry of judgment); and (b) defendant was not doing business in this state at the time of service of process. (Tr., pp. 220 and 221.)

Defendant's motion was expressly based "upon the records, files, affidavits and evidence in this proceeding" and upon a new affidavit therewith filed, namely, that of Robert V. Jordan, dated June 17th, 1935 (Tr., pp. 221, 222 and 223).

The matter was continued to July 29th, 1935, in order to give plaintiff an opportunity to reply to defendant's motion.

At this point, present counsel for plaintiff for reasons which need not be specifically herein stated determined once and for all to independently check the numerous affidavits which defendant had filed in connection with its alleged methods of doing business in California.

The result of this investigation was truly astounding. Complete retractions were made by two of the affiants who had previously filed affidavits on behalf of the defendant and who would now voluntarily file repudiatory affidavits. Further, although John Brash and J. W.

Howell do not in so many words state that they perjured themselves when they made their earlier affidavits which were filed by defendant in its behalf, an examination of the two sets of affidavits can lead to no other conclusion.

[1] In his second affidavit, John Brash said in substance that for ten years he had been superintendent of Lawrence Warehouse Company in San Francisco, now known as the Haslett Warehouse Company:

“That affiant knows and at all times herein mentioned has known of business concern, Liquid Veneer Corporation of Buffalo, N. Y., and that during all of said time up to and until May 4, 1932, said Liquid Veneer Corporation has maintained an account with said warehouse companies and maintained a stock of merchandise therewith:

“That on or about May 4, 1932, said account and merchandise was transferred to the G. A. Hosmer Co. in which last mentioned name account has remained, until April 18, 1935, at which time the said G. A. Hosmer Co. instructed said Haslett Warehouse Co. to ship all of its Liquid Veneer Products merchandise out of the state temporarily.

“That at all times herein mentioned, said Liquid Veneer Corporation and for G. A. Hosmer Co. has maintained with said Lawrence Warehouse Co. and said Haslett Warehouse Co. as the case may be, a stock of merchandise, which would be stored in said warehouses until,

“1—Orders were received to fill any order sent in by said Liquid Veneer Corporation or said G. A. Hosmer Co.

“2—Local customers, which were on the accredited list of said Liquid Veneer Corporation or G. A.

Hosmer Co. would call said warehouse companies and request various amounts of such merchandise to be delivered without direct order from Liquid Veneer Corporation after which the said warehouse companies would inform the said Liquid Veneer Corporation or G. A. Hosmer Co. as the case may be of the request for and delivery of such merchandise, to said accredited customers.

“That a certain amount of such merchandise was always kept on hand at said warehouses for the purpose of securing the warehouseman’s lien for storage thereof and services rendered to its said customers herein above referred to and for the purpose of filling future orders.

“That said Liquid Veneer Corporation or G. A. Hosmer Co. would ship to said warehouses carload quantities of its merchandise, which was stored until sold, which took from one month to two years or more to-wit:

“1—On September 8, 1931, there was on hand in said warehouse 2 cases of 12 gross each of such merchandise from a particular shipment which was disposed of by orders at various times and dates up to and until May 18, 1935.

“2—On February 3, 1930, said warehouse had on hand 23 cases and 14 dozen of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to May 1, 1932. When balance of said merchandise was ordered shipped out on order of G. A. Hosmer Co.

“3—On January 16, 1932, said warehouse had on hand 11 cases of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to

March 12, 1934, at which time there was left of said lot or shipment of merchandise 7 cases thereof and on January 24, 1935, said 7 cases were delivered on order of G. A. Hosmer Co. That such statements of shipments and the dates and methods of delivery of said merchandise are taken from the permanent records of said warehouses which are too numerous to set forth herein, all of which are typical of said records herein above set forth and which reflect the method or methods of handling, delivering or storing the merchandise of said Liquid Veneer Corporation.

“That on May 4, 1932, the said Haslett Warehouse Co. received a letter dated April 30, 1932, from the Liquid Veneer Corporation instructing said warehouse Company to transfer all merchandise and records to the account of G. A. Hosmer Co. effective as of February 1, 1932, and make all future shipments and bills for the account of G. A. Hosmer Co.

“That no merchandise was ever received from said Liquid Veneer Corporation or G. A. Hosmer Co. on consignment basis, but was at all times received for storage to be held until such time as future sale orders were received for same which in some instances such orders were not received for as long as 2 years thereafter.

“That the foregoing is a true statement of the method or methods used by the Lawrence Warehouse Co. #19, now known as the Humboldt Warehouse of the Haslett Warehouse Co. in receiving, handling, storing and shipping the merchandise of the said Liquid Veneer Corporation and G. A. Hosmer Co.

“This affidavit is given pursuant to a subpoena and subpoena duces *taken* and issued July 13, 1935,

in the above entitled matter and served upon the said Haslett Warehouse Co.” (Tr., pp. 226, 227 and 228.)

[2] In his second affidavit, J. W. Howell states in substance that he has for many years been secretary of the Lawrence Warehouse Company now known as the Haslett Warehouse Co. in San Francisco and:

“That at the time the Haslett Company took over said warehouse John (Jack) Brash was the superintendent in charge, W. G. Heiss was in charge of the office and the clerical work and records and George Savage was employed in various capacities and as a substitute for Mr. Heiss in case of his absence from the office; that said named persons were continued in their several capacities as employees of the Haslett Warehouse Company and all except Savage have ever since maintained their respective positions.

* * * *

“That affiant knows, and at all times herein mentioned has known of the business concern, Liquid Veneer Corporation of Buffalo, New York, and that during all of said time up to and until May 4th, 1932, said Liquid Veneer Corporation has maintained an account with said warehouse companies and maintained a stock of merchandise therewith.

“That on or about May 4th, 1932, said account and merchandise was transferred as of February 1st, 1932, to the G. A. Hosmer Co. in which last mentioned name account has remained, until April 18th, 1935, at which time said G. A. Hosmer Co. instructed said Haslett Warehouse Co. to ship all of its Liquid Veneer products merchandise out of the state.

“That at all times herein mentioned, said Liquid Veneer Corporation or G. A. Hosmer Co. has maintained with said Lawrence Warehouse Company and said Haslett Warehouse Co. as the case may be, a stock of merchandise which would be stored in said warehouses until:

“(1) Orders were received to fill any order sent in by said Liquid Veneer Corporation or said G. A. Hosmer Co.

“(2) Local customers, which were on the accredited list of said Liquid Veneer Corporation or G. A. Hosmer Co. would call said warehouse companies and request various amounts of such merchandise to be delivered without direct order from Liquid Veneer Corporation after which the said warehouse companies would inform the said Liquid Veneer Corporation or G. A. Hosmer Co. as the case may be of the request for and delivery of such merchandise, to said accredited customers.

“That said Liquid Veneer Corporation or G. A. Hosmer Co. would ship to said warehouses carload quantities of its merchandise, part of which was stored until sold, which took from one month to two years or more, to-wit:

“(1) On September 8th, 1931, there was on hand in said warehouse 2 cases of 12 gross each of such merchandise from a particular shipment which was disposed of by orders at various times and dates up to and until May 18th, 1935.

“(2) On February 3rd, 1930, said warehouse had on hand 23 cases and 14 dozen of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and date up to May 1st, 1932, when balance of said

merchandise was ordered shipped out on order of G. A. Hosmer Co.

“(3) On January 16th, 1932, said warehouse had on hand 11 cases of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to March 12th, 1934, at which time there was left of said lot or shipment of merchandise 7 cases thereof and on January 24th, 1935, said 7 cases were delivered on order of G. A. Hosmer Co. That such statements of shipments and the date and methods of delivery of said merchandise are taken from the permanent records of said warehouses which are too numerous to set forth herein, all of which are typical of said records hereinabove set forth and which reflect the method or methods of handling, delivering or storing the merchandise of said Liquid Veneer Corporation.

“That on May 4th, 1932, the said Haslett Warehouse Company received a letter dated April 30th, 1932, from the Liquid Veneer Corporation instructing said warehouse Company *received a letter dated April 30th, 1932, from the Liquid Veneer Corporation instructing said warehouse company* to transfer all merchandise and records to the account of G. A. Hosmer Co. Effective as of February 1st, 1932, and make all future shipments and bills for the account of G. A. Hosmer Co.

“That no merchandise was ever received from said Liquid Veneer Corporation or G. A. Hosmer Co. on consignment basis, but was at all times received for storage to be held until such time as future sale orders were received for same which in some instances such orders were not received for as long as 2 years thereafter.

“That affiant personally knows and has examined all of the records of the Lawrence Warehouse Company which conducted the warehousing of the Liquid Veneer merchandise up to the time that the Haslett Warehouse Company took over the Lawrence Warehouse Number 19 and that affiant knows that these records which are too cumbersome and numerous to attach to this affidavit fully reflect the statements therein made.

“That the foregoing is a true statement of the method or methods used by the Lawrence Warehouse Company Number 19, now known as the Humboldt Warehouse of the Haslett Warehouse Co. in receiving, handling, storing and shipping and merchandise of the said Liquid Veneer Corporation and G. A. Hosmer Co.

“This affidavit is given pursuant to a subpoena and subpoena duces tecum issued July 13th, 1935, in the above entitled matter and served upon the said Haslett Warehouse Co.” (Tr., pp. 235, 236, 237, 238 and 239.)

These two affidavits completely repudiate all of the affidavits which defendant had filed in its behalf at the time it urged the motion to dismiss.

[3] But in addition, at the same time, plaintiff filed an affidavit of Isador I. Smuckler, one of the attorneys of record for plaintiff. Although the affidavit is hearsay, it is the type of evidence to which defendant has exclusively resorted. Without setting out the affidavit hereat, the attention of this Honorable Court is referred to it as it appears in the Transcript at page 231, et seq.

The statements therein made are entitled to credence because they are backed up by the supporting affidavits of John Brash and J. W. Howell.

In addition, at the same time, plaintiff filed the affidavit of Byron Jack Badham, Jr. (Tr., p. 229), purchasing agent for Hoffman Hardware Company of Los Angeles, for the past ten years, who said:

“That in his capacity as purchasing agent, he is intimately acquainted with the merchandising methods of Hoffman Hardware Company. That Hoffman Hardware Company has for many years last past, including the past six (6) years, bought merchandise from the Liquid Veneer Corporation of Buffalo, New York. That affiant personally knows E. C. Mack who is the Pacific Coast representative of the Liquid Veneer Corporation and that he has dealt with said E. C. Mack for the past six (6) years. That during these years and with particular reference to the years 1931 and 1932 said E. C. Mack would visit the Hoffman Hardware Company regularly on the average of every two (2) or three (3) months. That during said times said E. C. Mack on behalf of the Liquid Veneer Corporation would solicit business for the Liquid Veneer Corporation and would endeavor to sell Hoffman Hardware Company increased quantities of the various Liquid Veneer products. That the said Hoffman Hardware Company would look to said E. C. Mack as the person with whom all matters relating to Liquid Veneer Corporation could on numerous occasions be discussed and straightened out. That generally all orders of Liquid Veneer products would be mailed directly to Lawrence Warehouse #19, in San

Francisco, California, now known as the Humbolt warehouse of the Haslett Warehouse Company, or to the said E. C. Mack, at his San Francisco, California address, and shortly thereafter, generally within three (3) or four (4) days, the said orders were filled from the Liquid Veneer Corporation's stock of merchandise left at the Lawrence Warehouse (since 1932 known as the Haslett Warehouse) in San Francisco, California. Rarely were the orders either sent directly to Buffalo, New York, or filled from merchandise sent from Buffalo, New York, for the express purpose of filling the orders; and never was it necessary as a matter of policy for any orders first to be approved by the home office of the said Liquid Veneer Corporation at Buffalo, New York, before the said would be filled from merchandise on hand at the Warehouse in San Francisco, California, which warehouse was always designated on the invoices of the Liquid Veneer Corporation as 'Our Warehouse at San Francisco.'

"Affiant further states that the invoices attached to this affidavit are of the original records of the Hoffman Hardware Company and correctly indicate that during all of the years the Hoffman Hardware Company did business with Liquid Veneer Corporation, the orders were filled from the designated Liquid Veneer Corporation's warehouse at San Francisco, California." (Tr., pp. 229 and 230.)

Attached to this affidavit and giving it probative value are photostatic copies of original invoices demonstrating undeniably that all of the company's orders of Liquid Veneer merchandise were regularly and continuously filled from the regular stock of merchandise which the

defendant kept on hand at their San Francisco warehouse. (See Exhibits, Tr., opposite p. 230.)

When the true situation became plain, defendant in a desperate effort to have these affidavits stricken from the record, resorted to the ingenious device of *withdrawing its motion to dismiss which it had so persistently pressed for three years.* (Tr., p. 239.)

The Court granted this request to withdraw defendant's motion to dismiss but properly held that the affidavits filed by plaintiff were nevertheless competent concerning the question of defendant doing business in California and so refused to strike them from the files.

Defendant now strongly urges that these later affidavits which showed its own affidavits to be untruthful must not now be considered by this Honorable Court in determining whether or not the District Court properly exercised jurisdiction.

Our sense of justice should be rightfully outraged at such sophistry.

But regardless, defendant has itself told us in strong language that "jurisdiction over the parties must affirmatively appear in the record proper * * * and the question as to its existence may be raised at any time." (App. Br., p. 93.) True, and for that reason this Honorable Court should examine all of the evidence which is part of the record in whatever stage of the proceedings it may have been received. Be that as it may, the situation now most clearly establishes the truth of the testimony of plaintiff throughout the trial, namely, that the defendant at the time of the filing of the complaint and of the service of the summons *was doing business in the State of*

California within the principles of law which permit a personal judgment to be rendered against a foreign corporation so carrying on business in California. The record now discloses clearly and adequately without any truthful contradiction, the following state of facts in so far as the Liquid Veneer Corporation's activities in California are concerned.

[1] Liquid Veneer Corporation has sold its full line of products in California for many years past. (Testimony of William Max of the May Company and testimony of Ben L. Strauss of the May Company and testimony of Mr. Waddington, formerly of Young's Market Company, affidavit of John Brash and affidavit of B. J. Bedham, Jr., of the Hoffman Hardware Company.)

[2] Liquid Veneer Corporation maintained a Pacific Coast representative in California, whose residence was in San Francisco and who solicited business for the Liquid Veneer Corporation from all of its many California customers, and who regularly, although periodically, visited these California customers and who was the California contact man for the Liquid Veneer Corporation.

[3] Practically all of the orders for Liquid Veneer products were filled from the warehouse at San Francisco, California, where a stock of Liquid Veneer products was permanently kept on hand, and which warehouse the defendant called "Our warehouse in San Francisco," and which orders were directly filled from the California stock without the orders being first approved by the Home Office of the Liquid Veneer Corporation at Buffalo, New York. (Testimony of Robert H. Breckenridge of the

May Company at the hearing on the motion to quash held on May 13th, 1933, and exhibits filed at that time and re-filed at the time of the trial, May 8th, 1935; affidavit of B. J. Bedham, Jr., of the Hoffman Hardware Company of Los Angeles, California; affidavit of John Brash, superintendent of the Haslett Warehouse Company of San Francisco, California, and affidavit of J. H. Howell, secretary of the Haslett Warehouse Company of San Francisco, California.

Keeping the facts of our case clearly in mind—and we submit it makes no difference whether all of the evidence in this regard is considered or only part of it—and applying to them the undisputable rules of law declared by the numerous cases which we have cited above, we can reach no other conclusion but that Liquid Veneer Corporation in spite of its ingenious scheme to avoid amenability to the laws of the State of California where it was carrying on a substantial business on a large scale, nevertheless was as a matter of law subject to be sued in this state.

IV.

**THERE ARE NO PREJUDICIAL ERRORS
IN THE RECORD**

A. The Pleadings Are Adequate

Defendant feels aggrieved because of alleged weakness in the pleadings:

It charges that the complaint does not state a cause of action.

(a) First, because it does not state that the defendant was doing business in the State of California.

Admitting solely for the sake of argument that such an allegation is a necessary part of the complaint, there are three complete answers:

(1) Plaintiff's request to have the complaint amended in this respect, was granted by the trial court. (Tr., p. 130.) If this was a defect, the amendment cured it as of the date of the filing of the complaint. There can be no dispute that an amendment to the pleadings to conform to the proof is entirely proper and that the amended pleading takes effect as if filed as the original pleading.

21 *Cal. Jur.* 177, 185, 197, 198, 207, 212 and 213;
Chatham v. Mansfield, 1 Cal. App. 298, 82 Pac. 343.

(2) In the second place, the question of whether defendant was "doing business" in California, had been an issue between the parties for more than three years; defendant knew at all times that this was part of plaintiff's cause of action, and so could not have been in any way damaged or surprised by the plaintiff being permitted to amend her complaint to conform to the proofs; and

(3) In the third place, no special demurrer was filed by defendant and the matter was never brought up during this three year period elapsing from the filing of the complaint to the day of the trial, as the trial judge very properly remarked:

“The Court: Proceed in the manner indicated and your Motion is denied; that is I will decline to hear it at this time because, out of all fairness to the Court, such a motion should have been presented a long time ago if there was any intention on the part of the defendant to present any such question as that.

“Sheehan: Well, of course we intended to but we thought we could present it on the opening of the trial.

“The Court: Proceed.” (Tr., p. 128.)

(b) Secondly, because it did not allege that the libelous letter was written “of and concerning the plaintiff.”

Here again, assuming for the sake of argument that such an allegation was necessary (and parenthetically it may be said that it is plain that no such allegation was necessary, it being clearly a question for the jury to determine), plaintiff requested to be allowed to amend her complaint so as to state this allegation. This amendment was permitted. (Tr., p. 38.)

Defendant's naivete crops up again in this connection. It complains bitterly because plaintiff was allowed to amend her complaint in two particulars to conform to the proofs; *yet defendant was itself permitted to amend its answer and to set up a special defense which it is now*

urging on appeal, namely that the communication from defendant to its customers in which it libeled plaintiff, was privileged.

Reason exits and sophistry enters when it is urged as defendant does that the same thing becomes a “good” when affecting defendant and a “bad” when affecting plaintiff.

B. The Proof Amply Sustains the Judgment

[1] *The letter set out in the complaint was clearly libelous per se.*

The merits of plaintiff’s case on the evidence is most convincingly demonstrated by the fact that out of a 224 page brief, *defendant finds no place to discuss the question of whether the verdict is supported by the evidence.*

Obviously, this is so clear that even capable and ingenious counsel for the defendant could find nothing to say on this score.

But plaintiff will be pardoned for referring somewhat to the evidence for she feels that *this case will go down in the annals as one of the most vicious examples of a planned and malicious program of destruction by a large influential business concern of a weak competitor who because she had a good product and worked hard was able to corner for herself a tiny share of the business which defendant could not bear to see taken from it by honest means.*

Plaintiff’s case is practically uncontradicted.

Being uncontradicted, having been so found by the jury, and not even being discussed by counsel in their elaborate brief for defendant, we start off with the proved

fact that plaintiff was libeled by a letter written of and concerning her by the defendant with intent to injure her in her business.

For the convenience of the Court, the letter is reprinted hereat:

“June 2, 1931.

“Young’s Market,
7th Street,
Los Angeles, California.

ATTEF. General Manager

“Gentlemen:—

“Our inspector reports your selling and offering for sale a product called ‘French Veneer’, this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark ‘Liquid Veneer’ as well as our common law rights.

“We recently found this product on sale at the May Company. We have explained our position to the May Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Courts as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

“We have had more or less difficulty with these people who manufacture this so-called ‘French Veneer’, have tried to purchase evidence against them individually, but they moved around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

“It is a different matter, however, where we find a responsible house, like yourselves, handling an infringing product, because at the end of a law suit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

“When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We therefore request that you immediately discontinue the sale of this infringing product and advise us to that effect promptly.

“The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to someone else, who has spent a fortune in building up their business under that name.

“His object for adopting the name ‘French Veneer’ is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing ‘French Veneer’ which she had been using for years. This housewife on finding that she had purchased the wrong Veneer returned it to the May Company and received the proper genuine ‘Liquid Veneer’.

“We will await your prompt reply, and remain, meanwhile,

“Yours very truly,

“LIQUID VENEER CORPORATION

“MARTIN J. CABANA

(Tr., pp. 5 to 7.)

“Vice President.”

The following authorities establish beyond doubt that this letter was a libel per se, that is, as a matter of law.

California Civil Code, §46;

Bates v. Campbell, 213 Cal. 438;

Schoenberg v. Walker, 132 Cal. 224;

Stevens v. Snow, 191 Cal. 58;

New Iberis Extract, Etc. v. McElhaney, 132 La. 149, 61 So. 131;

Pennsylvania Iron Works v. Wright, 29 Ky. 1, 8 L. R. A. (N.S.) 102;

Dun v. Weintraub, 111 Ga. 416, 419, 50 L. R. A. 670;

Actna Life Insurance Company v. Mutual Benefit Health and Accident Association, C. C. A. 8, February 28th, 1936, 82 Fed. 115.

[2] *This letter was not a privileged communication.*

Defendant does not directly argue that this letter of June 21st, 1931, written by defendant to Young's Market Company, a customer of both plaintiff and defendant, was a privileged communication, but indirectly urges this by charging that inasmuch as the letter was privileged, it was necessary that the complaint allege *actual malice*. (Appl. Br., pp. 146, 147, 154 and 155.)

This is, of course, not the law.

Section 47 of the *California Civil Code* defines a privileged communication as one made “* * * in a communication without malice to a person interested therein by (1) one who is also interested or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the com-

munication innocent, or (3) who is requested by the person interested to give the information. * * *.”

This privilege is obviously a qualified one, only to be availed of if written (1) without malice, and (2) if the nature of the communication is innocent.

16 *Cal. Jur* 67, Section 38;

Clark v. McChung, 215 *Cal.* 279, 284.

In the very recent case of *Aetna Life Insurance Company v. Mutual Benefit Health and Accident Association*, supra, the general agent of the defendant insurance company wrote a letter to a sub-agent of the same company derogatory of the financial condition of a competing company. The Circuit Court of Appeals for the Eighth Circuit held that the libelous letter was not privileged, saying:

“This was not a privileged communication within the legal conception of the term, nor under the authorities cited by counsel for defendant in support of this claim. To be privileged it must be honestly made, by a person interested in the subject-matter to one similarly interested, in order to protect that common interest. Newell, *Slander and Libel* (4th Ed.) §432. The parties must stand in such a relation that it is a reasonable duty, or is proper, for the writer to give the information communicated. *Weise v. Brotherhood of Locomotive Firemen and Engine-men* (C. C. A. 8), 252 F. 961, 963. The court in its charge instructed the jury that this communication was not privileged, and no exception was taken to that instruction, nor to any part of the court’s charge. These two companies sustained no relations

with each other and none was contemplated. It would be remarkable if a communication, having for its manifest object a harm to the business of a competitor, could be viewed as a bona fide discharge of a public or private duty, legal or moral, in the prosecution of the writer's own rights and interests (*White v. Nichols*, 3 How. 266, 11 L. Ed. 591), and the protection of the common interest involved. It has yet to be accepted that any business is privileged to advance itself by pulling down a competitor through unfair trade practices. It is to be noted that defendant's contention in pleading and brief is that Buchanan had no authority to write such a letter, and its vice president testified that, when the letter was brought to his attention, he criticized Buchanan for preparing it. In the face of the attendant circumstances the plea of qualified privilege cannot be indulged." (p. 119.)

No more need be said on this score.

[3] *It was entirely proper for the Court to permit the introduction of other letters sent by the defendant to both the May Company and Young's Market Company along the same tenor as the libelous letter set out in the complaint, all showing a plan to injure plaintiff's business and reputation.*

In this connection, reference may logically be made to defendant's exception to the introduction in evidence of other libelous letters besides the one mentioned in the complaint (*Appl. Br.*, p. 157, et seq.).

These letters are all along the same line as the letter mentioned in the complaint, written either to the May

Company or to Young's Market Company and threatening to sue them if they did not discontinue sale of plaintiff's "French Veneer".

It is entirely well settled that in a libel action, letters written by the defendant either *before* or *after* the writing of the libelous letter complained of, are admissible to show malice on the part of the defendant and to show the existence of a plan or scheme to injure plaintiff's business or reputation.

Scott v. Times-Mirror Company, 181 Cal. 345, 362:

"Any previous quarrel, rivalry or ill-feeling between plaintiff and defendant—in short, almost everything defendant has ever said or done with reference to the plaintiff—may be urged as evidence of malice. The plaintiff has to show what was in the defendant's mind at the time of the publication, and of that no doubt the defendant's acts and words on that occasion are the best evidence. But if plaintiff can prove that at any other time, before or after, defendant had any ill-feeling against him, that is some evidence that the ill-feeling existed also at the date of publication; therefore, all defendant's acts and deeds that point to the existence of such ill-feeling at any date are evidence admissible for what they are worth. * * *

"In fact, whenever the state of a person's mind on a particular occasion is in issue, everything that can throw any light on the state of his mind then is admissible, although it happened on some other occasion. * * *

"* * * The more the evidence approaches proof of a systematic practice of libeling or slandering the

plaintiff the more convincing it will be. (Odgers on Libel and Slander, 5th ed., pp. 348, 349.)

“Any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the animus of the defendant; and for this purpose it makes no difference whether the words tendered in evidence be themselves actionable or not, or whether they be addressed to the same party as the words sued on or to someone else. Such other words need not be connected with or refer to the defamatory matter sued on, provided they in any way tend to show malice in defendant’s mind at the time of publication. And not only are such other words admissible in evidence, but also circumstances attending the publication, the mode and extent of their repetition. The more the evidence approaches proof of a systematic practice of libeling or slandering the plaintiff, the more convincing it will be. (Newell on Slander and Libel, 3d ed., p. 405.)”

In fact, in all states except in New York and Tennessee, proof of repetition of defendant’s libelous statement is no less admissible because it was made *even after the commencement of the action for the original publication.*

Norris v. Elliott, 39 Cal. 72;

Westerfield v. Scripps, 119 Cal. 607, 51 Pac. 958;

Hearne v. De Young, 119 Cal. 670, 52 Pac. 150;

Tingley v. Times-Mirror Company, 151 Cal. 1.

In fact the rule is so broad that other defamatory declarations by defendant concerning plaintiff may be

admissible even though they are dissimilar in character to the statement sued on.

Chamberlain v. Vance, 51 Cal. 75;
Stern v. Lowenthal, 77 Cal. 340, 19 Pac. 579;
Scott v. Times-Mirror Company (supra;
Earl v. Times-Mirror Company, 185 Cal. 165, 169.

See also discussing these rules:

12 *A. L. R.* 1026:

"It seems to be well settled that prior or contemporaneous utterances of other defamatory words, of similar import to those for which damages are claimed in an action for libel or slander, are competent to show malice on the part of the defendant.

"UNITED STATES.—*Gibson v. Cincinnati Enquirer* (1877), 2 Flipp. 121 Fed. Cac. No. 5,392; *Post Pub. Co. v. Hallam* (1893), 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530, affirming (1893) 55 Fed. 456, and disapproving *Frazier v. McCloskey* (1875), 60 N. Y. 337, 19 Am. Rep. 193; *Haskell v. Bailey* (1894), 11 C. C. A. 476, 25 U. S. App. 99, 63 Fed. 873; *Examiner Printing Co. v. Aston* (1916), 151 C. C. A. 395, 238 Fed. 459.

"CALIFORNIA.—*Preston v. Frey* (1891), 91 Cal. 107, 27 Pac. 533."

12 *A. L. R.* 1029:

"Malice is the very gist of the action of libel or slander, and it follows that all the circumstances which go to prove it, or from which it may be inferred, necessarily enter into it. There is perhaps no circumstance which more strongly evidences animus in the publication of defamatory words, than

their frequent repetition. It is on this principle that many cases have held that words of similar import, spoken subsequently to those laid in the declaration, are admissible.

“CALIFORNIA.—*Marris v. Zanone* (1892) 93 Cal. 59, 28 Pac. 845; *Tingley v. Times Mirror Co.* (1907) 151 Cal. 1, 89 Pac. 1097.”

12 *A. L. R.* 1031:

“Except in New York (see *infra*, IV.) and Tennessee (see *infra*, VI.), proof of the repetition of a defamatory statement is none the less admissible because it was made after the commencement of the action for the original publication.”

12 *A. L. R.* 1033:

“It is held by the weight of authority that, for the purpose of establishing malice, the plaintiff in a civil action for libel or slander may prove the publication by the defendant of other defamatory statements concerning him, though they are dissimilar in character to that sued on.”

For a later discussion setting out the same rules, see:
86 *A. L. R.* 1297:

[4] *The damages awarded were not excessive.*

(a) There was sufficient evidence to sustain the award of actual or compensatory damages.

The jury awarded the plaintiff the sum of \$11,000.00 for actual damages. In making this award, they were able under the law to take into consideration the following numerous items of damage:

(2) Business loss sustained by the plaintiff because of defendant's libelous interference with plaintiff's customers.

There was competent proof of three unimpeachable and uncontradicted witnesses showing that had plaintiff not been systematically libeled by defendant, and had she been allowed to retain her customers, that she would have built up a very substantial and profitable business.

Mr. B. L. Strauss, general merchandising manager of the May Company for many years, in substance testified that as a result of the defendant's letters to the May Company, they suspended the sale of French Veneer about April 2nd, 1929, and that French Veneer has been off the shelves of the May Company ever since because of threatened litigation by the defendant; that he had contemplated putting in French Veneer in the other May Company stores throughout the country; that preliminary arrangements for this had been made with Mrs. Smuckler but that he decided not to do so because of the threatened litigation by the defendant; that it was his mature judgment, based upon thirty years' experience in merchandising, that if plaintiff had not been harassed by the defendant her business would have expanded to a great extent because her product was genuine and a consistent demand for it had been created. (Tr., pp. 138 to 169.)

Mr. William Max, for many years Buyer for the household goods and hardware department of the May Company, testified in substance up on the question of damages as follows: That after the receipt by the May

Company of the libelous letter of March 27th, 1929, in which the defendant threatened to sue the May Company for selling French Veneer, that the sale of French Veneer was discontinued permanently and that not until April, 1930, was the new product French Polish sold at the May Company; that, therefore, there was a complete loss of business as far as French Veneer was concerned of more than a year and that because of the demand for French Veneer, he suggested to the plaintiff that the product be re-marketed under the new name. (Tr., pp. 170 to 174.)

Mr. E. C. Waddington, who at the time in question was an executive of Young's Market Company, had this to say upon the question of damages:

That French Veneer was taken out of stock at Young's markets immediately after the receipt of the libelous letter of June 2nd, 1931, which is set out in the complaint; that French Veneer previous to that sold excellently; that even after it was taken off the shelves there was a consistent and steady demand for the product; that in all his thirty years' experience in merchandising, he had never seen a similar product which sold so quickly after being first introduced. (Tr., pp. 174 to 190.)

All of this evidence was uncontradicted and unimpeached.

That plaintiff herself testified with respect to damages as follows :

That the only income which was necessary to sustain herself, her husband and a family of five children in a moderately comfortable station of life and over a period of nearly twenty years was obtained from the sale of

French Veneer; that until her business was practically limited to only the May Company and Young's Market Company because of the persistent intimidations of her customers by the defendant, she had about two thousand customers throughout the Pacific Coast and filled from twenty-five to fifty letter orders per day; that for a considerable number of years, she grossed about \$1,000 per month and netted about \$600.00 a month; that her income from polish sales was her sole income until 1929 when two of her sons partially assisted her; that even as late as 1929 her income from the sale of French Veneer was between \$300.00 and \$400.00 per month; that since about 1930, she has been supporting herself by selling French Polish and French Silver Polish. This evidence was uncontradicted and must, therefore, be considered wholly true. (Tr., pp. 192 to 202.)

[2] In addition to actual loss to her business, the jury had the right to consider damage to plaintiff's reputation.

Scott v. Times-Mirror Co., 181 Cal. 345 at 365.

[3] The jury also had the right to award damages to plaintiff for her injured feelings and mental suffering caused by defendant's conduct.

Scott v. Times-Mirror Co., 181 Cal. 345 at 364.

Considering all of these elements, it certainly cannot be said that the jury was motivated by "passion or prejudice in such a degree as to shock the moral sense" (which as will be shown later is the test for setting aside excessive verdicts).

(b) The jury award of \$9,000.00 punitive or exemplary damages were certainly not excessive.

First, let us devote a few words to defendant's complaint that exemplary damages were improper because they were not pleaded in the complaint. (App. Br., p. 205.) The argument made is so obviously erroneous and the citation of authorities by defendant are so carelessly made with reckless disregard of their true holdings, that we may be pardoned for referring to them in order to again demonstrate the continual piling up of arguments and authorities by defendant without serious analysis or checking of these authorities as to their pertinent application to the real facts and issues in our case.

The complaint clearly and distinctly charges *malice* on the part of defendant. Paragraph VI of the complaint in part alleges:

“That for a long time prior to this date, the defendant has continuously and systematically and for the purpose of injuring the reputation and the business conducted by this plaintiff, caused letters to be mailed to various customers of this plaintiff for the purpose of destroying the business relations that existed between plaintiff and her customers, and that said letters were written for the *purpose of wilfully and maliciously injuring* the good name of the plaintiff and for the further purpose of destroying the business that plaintiff has established in the State of California and elsewhere.” (Tr., pp. 4 and 5.)

Again, in Paragraph VII of the complaint, it is stated:

“That by the foregoing false, malicious and defamatory language, the defendant, Liquid Veneer

Corporation, intended to and did convey the meaning that the plaintiff had infringed upon a right that the defendant, Liquid Veneer Corporation, * * * etc.” (Tr., p. 7.)

And again in Paragraph IX:

“That the statements contained in the communications addressed by the defendant, Liquid Veneer Corporation, were false, malicious and untrue, and were made only for the purpose of destroying the good name and reputation and business of this plaintiff, and that by reason of the same false, malicious and defamatory publication aforesaid, plaintiff has been and is greatly injured and prejudiced, and that the reputation of her business has been prejudiced and injured and she has lost and been deprived of great gain and profit which would otherwise have arisen and accrued to her in her said business.” (Tr., p. 8.)

And the prayer of the complaint plaintiff asks for:

“2. For such sum that the court may deem just and equitable in the form of exemplary and/or punitive damages.” (Tr., p. 9.)

The instructions of the Court to the jury clearly and distinctly made *malice* an issue for the jury to pass upon.

“In addition thereto, however, gentlemen, the law in this state and, I guess in every state, provides for what are known as exemplary damages that mean something different from actual damages.

“In an action for the breach of an obligation not arising from contract, such as is charged in this case, where the defendant has been guilty of oppression or fraud or malice—and in this case it would mean

express malice—the plaintiff in addition to actual damages may recover damages for the sake of example and by way of punishing the defendant.

“If, now, you think that this method used by the defendant was engendered and rested in the purpose to destroy the business of the plaintiff, was done and made with ill-will toward the plaintiff, or accompanied and did itself consist in an act of oppression, then you are at liberty to award exemplary damages: that is, exemplary as opposed to compensatory, meaning damages that are to reimburse for actual loss suffered, and you may award exemplary damages, that is, damages by way of example.” (Tr., pp. 217 and 218.)

With this situation evident, it is clear beyond controversy that a verdict for exemplary damages was entirely proper. The law is clearly stated as follows:

16 *Cal. Juris.* 143:

“An allegation of express malice and an intent to injure plaintiff’s reputation, followed by a general prayer for damages, is sufficient to sustain an award for punitive damages, though not expressly prayed for.”

Waite v. San Fernando Publishing Company, 178 Cal. 303 at 307, 173 Pac. 591:

“The appellants’ final contention is that the verdict of the jury was contrary to law, in so far as it undertook to assess punitive damages against the defendant for being actuated by actual malice in making the publication complained of. Much of the argument addressed to this point is occupied with a dis-

cussion of the evidence and the deductions to be drawn therefrom, but these were matters for the jury. The complaint charged the defendants with express malice and with the malicious intent of injuring plaintiff's reputation. There is sufficient evidence in the record to have justified the jury in finding these averments to be true. The plaintiff, it is true, did not expressly pray for punitive damages in so many words, but he did ask for a general verdict for damages in the sum of twenty thousand dollars. This was sufficient to have justified the jury in making its award of the sum allowed for exemplary damages. We find no merit, therefore, in the appellants' contention in this regard."

With the law so clear and so plain, it must be concluded that defendant is attempting to mislead this Honorable Court when it cites unexplained excerpts from four California cases, as follows:

Syfert v. Solomon, 95 Cal. 228, 237 (App. Br., p. 205), was a case involving breach of promise. While it is true the Court stated as excerpted by defendant that "no recovery of exemplary damages can be had unless such damages are alleged in the complaint", yet, it is plain that "the complaint alleges no facts which would constitute malice. * * * As malice was not made an issue in the case, either through pleadings or otherwise, it was error for the Court to instruct them that they might place a verdict for punitive damages thereon."

Belm v. Patrick, 109 Cal. App. 599 (App. Br., p. 205), was also a case involving breach of promise. Besides the quoted sentence to-wit, "It has also been held that in the

absence of such allegations it was error to award punitive damages though the evidence showed malice and oppression on the part of defendant," the Court stated,

"while exemplary damages need not be described by that name in the complaint, it is necessary that the facts justifying a recovery of such damages be pleaded * * * and in actions for a breach of a marriage promise something more than a mere refusal without sufficient excuse to perform the contract must be shown in order to authorize such an award. * * * In the present case the complaint contains no allegations of fraud or deceit * * * or was actuated by evil motives, nor does the evidence establish any of these facts or more than a refusal without sufficient excuse to perform the contract." (p. 607.)

The quotation from *O'Donnell v. Excelsior Amusement Company*, 110 Cal. App. 685 (App. Br., p. 206), which by the way was a case of assault and battery, is so obviously inapplicable to our case that no comment is needed.

The same is sufficient to dispose of defendant's reference to the case of *Taylor v. Lewis*, 132 Cal. App. 381 (App. Br., p. 206). In that case the Court held that the writing itself was not even libelous or defamatory.

This reference to defendant's proffered authorities and the careless analysis speaks for itself.

Now as to the amount itself, the Court will probably agree with counsel as well as with the jury itself that the defendant's conduct as reflected by the undisputed evidence was probably as reprehensible a case of willful viciousness as could be conceived.

The law gives the jury the right to award damages by way of example, and here the latitude of the jury is extremely broad.

Scott v. Times-Mirror Co., 181 Cal. 345 at 367:

“In the matter of punitive damages it is clear from the authorities that juries have a wider discretion in this regard than they have in the matter of compensatory damages. (Cases cited.) In *Luther v. Shaw*, 157 Wis. 234, * * * the court in affirming the award of punitive damages said: ‘Where the jury are properly given such broad discretion with reference to exemplary damages, as indicated by the code of instructions whereby they were told they might assess against the defendant a sum which they deemed just and proper, and best calculated to be an example to him and to others, such jury are entitled to observe these instructions in good faith as meaning just what they say. How, then, can it be said that their verdict is perverse? They disregarded no evidence and violated no instructions in fixing these exemplary damages. Their estimates of what would be sufficient as a punishment and a deterrent and an example was very high as compared with the actual damages assessed and high from any point of view, but it would hardly be candid to invite them in the language of this instruction to fix such sum which expressed their judgment in such matter, and then charge them with bias or perversity because the measure of their abhorrence of defendant’s conduct and their judgment of what would be a sufficient punishment and deterrent was represented by a larger sum of money than that which some other man or men would have allowed.’”

[c] In considering the extent of the award of damages both compensatory and exemplary, the jury properly has the right to consider the wealth and financial standing of the defendant company. This is an element that goes to the fairness of the award.

Marriott v. Williams, 152 Cal. 705;

Barclay v. Copeland, 74 Cal. 1.

[d] The amount of damages is a question properly left with the jury and should not be disturbed by the Court.

In *Wilson v. Fitch*, 41 Cal. 386, where there was no proof of actual malice, and as was held by the Court, not even a case for punitive damages, it was said in answer to the claim that the damages awarded were excessive:

“The court will not interfere in such cases, unless the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must necessarily be left to the exercise of a wide discretion, to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense and raises a presumption that it must have proceeded from passion or prejudice.”

The above language is adopted with approval by the Supreme Court of California in *Scott v. Times-Mirror Co.* (supra). See also 20 *Cal. Jur.* 101.

Cyc. of Fed. Proc., Vol. 5, p. 16:

“Where the jury has been properly instructed, the court is not inclined to interfere with the verdict because of objections as to its amount. It should not be set aside where there is any margin for a reasonable difference of opinion in the matter, for in such case the view of the court should yield to the conclusion of the jury.”

To a Court intimately familiar with the make-up of Federal Court juries, the charge that a verdict of a Federal jury in a matter of this sort is “so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury was under the influence of passion or prejudice” carries little conviction. A more reasonable, more sensible, more contrained, more painstaking and fairer lot of men would indeed be hard to find.

If a Federal Jury awarded the plaintiff \$20,000.00 damages both actual and punitive, this Honorable Court may rest assured it represents an eminently fair and reasonable award.

[5] *The instructions were fair and did not prejudice the defendant.*

From pages 189 to 199, defendant in its brief describes alleged erroneous instructions.

It is difficult to tell just what defendant is complaining about. But we gather that it deals mainly with the question of an instruction regarding the privileged or un-

privileged character of a libelous letter named in the complaint.

The Court defined a privileged communication as it is set out in Section 47 of the *California Civil Code*, except that by a slip of the tongue he once used the word “unprivileged” instead of “privileged.” But by saying further “if malice exists, then privilege cannot be claimed” it was made clear to the jury that the Court was speaking of what constitutes a privileged communication. (Tr., p. 213.) Later on, defendant’s counsel called the Court’s attention to something further on privileged communications, as follows:

“Mr. Sheehan: Your Honor, I believe your Honor misspoke when you first addressed the jury and you said ‘unprivileged’ when your Honor really meant ‘privileged’. In your definition of the privileged communication, that it is a communication by one person having an interest in the matter to another person having a like interest, that is, between two business houses, and I think your Honor misspoke on that.

“The Court: I read the section. That ought to be good enough.

“Mr. Sheehan: You did, but you misspoke yourself, your Honor, as I recollect it.

“I wish to except to your Honor’s failure to give each instruction submitted by defendant; and also except to all plaintiff’s proposed instructions as far as those were given.

“I then wish to except to that part of your Honor’s charge in which you stated that in a privileged communication that if the matters were false, that that could be charged against the defendant;

and I ask your Honor to charge that if the communication is privileged that even though the matters were false or uttered under a mistaken belief that the communication still remains privileged.

“The Court: Yes, you may take that instruction. I think that is correct. However, I emphasize or intended to emphasize, that true or false, it must be done in good faith. Very well.

“Mr. Sheehan: And just the other, the statute says that malice cannot be inferred before or after in a privileged communication.

“The Court: Yes.” (Tr., pp. 218 and 219.)

Although the Court’s instructions on this subject could probably have been more artfully articulated, there was no prejudicial error to the defendant company:

[1] The Court distinctly instructed the jury that they could find no exemplary damages unless they also found *express malice*. (Tr., p. 217.) The jury found exemplary damages; they, therefore, under the instruction must have found that there was express malice. If they found there was express malice then under any definition of a privileged communication there could have been no privilege in this case, because a privileged communication regardless of falsity must be without malice and innocently communicated. (*California Civil Code*, Section 47.)

[2] Appellant first argues that the instruction given by the Court on privileged communications was inadequate (App. Br., p. 189) and then turns about face and says (App. Br., p. 196) that the Court erred because it should have decided as a matter of law whether this letter was privileged, and should not have submitted it to the

jury at all. If that is true, then the Court gave the defendant an additional advantage by letting the jury even consider this matter, because as a matter of law there can be no other possible interpretation of the letter except that it was clearly unprivileged.

In any event, the test of a Court's instruction is whether they *as a whole* state the case fairly for the defendant.

4 *Cyc. Fed. Proc.*, Section 1451, p. 989. (Also Foot-note 97):

"The principal rule for construction probably is that the charge will be construed as a whole, and the jury will be presumed to have understood and considered it as such.

"97 Therefore, among other consequences an error in one part of the charge will be deemed to have been overcome by any corrective other portion, and the error thus made harmless or cured."

24 *Cal. Juris.*, p. 857, et seq.:

"It has been often stated that a trial court is not required to state all of the law applicable to a case in a single instruction. The charge must be read as a whole, that is to say, the instructions given should be considered in connection with each other; and if, without straining any portion of the language, the charge harmonizes as a whole and fairly and accurately states the law, a reversal may not be had because of verbal inaccuracies, because isolated sentences and phrases are open to just criticism, or because a separate instruction does not contain all of the conditions and limitations which are to be gathered from the entire charge."

An examination of the instructions shows beyond doubt that every intendment was made in favor of the defendant; the Court was entirely fair, stated the law correctly, did extremely little commenting upon the evidence and left the vital issues for the jury to decide. If anything, many correct and favorable instructions submitted by the plaintiff which could have substantially helped her case were entirely ignored by the Court. In any event, it certainly cannot be said that had the instructions been given identically as appellant would have it, that, considering all of the evidence in the case, the verdict would have been different. The errors, if any there be, are, therefore, clearly cured by the verdict.

24 *Cal. Juris.*, p. 868, Section 117, and cases cited.

24 *Cal. Juris.*, p. 862, and cases cited:

“As in other cases, to justify a reversal [on grounds of erroneous instructions] it must appear that a miscarriage of justice resulted.”

V.

THE JUDGMENT SHOULD BE AFFIRMED

The law is too well settled to require lengthy citations of authorities that every intendment must be made to sustain a judgment fairly reached.

6 *Cyc. Fed. Proc.*, p. 615.

Only if there are errors in the record which substantially have prejudiced the losing party should a judgment be reversed.

Title 28, *U. S. Code Ann.*, Section 391;

Dimmitt v. Breakley, 267 Fed. 192, Cert. Den. 254 U. S. 641.

It is incumbent on a party appealing from a judgment substantially just to point out not merely that there was technical error in the admission or rejection of evidence but that it was of such a nature that prejudice might reasonably have resulted therefrom.

This is equally well established as California law.

California Constitution, Article VI, Section 4½;

California Code of Civil Procedure, Section 475.

It is submitted that when the record as a whole is carefully read, the defendant had a fair trial and the verdict was fairly and impartially rendered.

VI.

SUMMARY AND CONCLUSION

This discussion has of necessity been so long that it may be well to briefly summarize the situation:

(1) Defendant has complained that the Secretary of State should not have been served because there is no showing that there was no one else who could have been served.

Plaintiff answers:

[a] In the first place, this technical argument is raised for the first time after trial and verdict, and should, therefore, be considered as having been waived; and

[b] The record and defendant's own affidavits show beyond doubt that defendant had no serviceable agent in California who could have been served with process; and

[c] It was, therefore, entirely proper for plaintiff to follow the statutory procedure set out in Section 406a of the *California Civil Code* and serve the Secretary of State for and on behalf of the defendant.

(2) Defendant complains that it was not doing business in California when it was served with process.

Plaintiff's answer:

[a] That by oral and documentary evidence it has been proved that defendant maintained a regular stock of merchandise in a warehouse in San Francisco from which stock orders were filled as they came in without it being necessary to have these orders first approved at Buffalo or without it being necessary to have these orders filled by merchandise sent directly from Buffalo.

[b] That under the law this constitutes "doing business" in California.

[c] That defendant's numerous ex parte affidavits on this issue of "doing business" in California were entitled to very little, if any, credence because they have in large part been discredited by actual repudiations.

(3) Defendant complains of numerous supposed errors in rulings and reception of evidence.

Plaintiff answers:

[a] These have all been analyzed and found to be without merit; and

[b] If there were any errors they were not substantial or prejudicial to the defendant in view of the entire record.

(4) Defendant complains that the judgment should be reversed.

Plaintiff answers:

[a] That there is ample evidence in the record to sustain the verdict.

[b] That the evidence is practically uncontradicted in every respect.

[c] That the jury's award of actual and exemplary damages should not be interfered with by this Honorable Court.

We have conscientiously and with great labor endeavored to squarely meet each and every assumed error raised by the defendant. That this task has been a long and tedious one is not due to any intrinsic difficulties in the case itself, but rather was necessitated by the unneces-

sary length to which the defendant resorted in its treatment of the case.

Stripped of imaginary errors repeated many times, the case is rather a simple one:

The plaintiff, a woman now well past 60 years of age, has fought long and hard to bring the defendant to the bar of justice. The verdict of the jury is not only a vindication of the rightfulness of her cause but is as well, compensation in part at least for her years of struggle against defendant's malicious abuse and underhanded undermining of her business and reputation. This case has been in actual litigation now for nearly five years and judging from past experience with it, much more labor will be necessary before the defendant will be forced to pay the award. We submit her cause to this Honorable Court fully confident that plaintiff's struggle has not been in vain.

Respectfully submitted,

HARRY GRAHAM BALTER,

Attorney for Appellee.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

4

LIQUID VENEER CORPORATION, a corporation,
Appellant,
vs.

LENA G. SMUCKLER,
Appellee.

APPELLANT'S PETITION FOR REHEARING.

BICKSLER, PARKE & CATLIN,
FRANK D. CATLIN,
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Attorneys for Appellant.

No. 8138

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

LIQUID VENEER CORPORATION, a corporation,
Appellant,

vs.

LENA G. SMUCKLER,
Appellee.

APPELLANT'S PETITION FOR REHEARING.

*To the Honorable, the United States Circuit Court of
Appeals for the Ninth Circuit and the Justices thereof:*

The appellant in the above entitled action now respectfully presents to your Honorable Court its petition for a rehearing after its decision of affirmance of the judgment of the trial court.

The serious error of this Honorable Court in reaching its decision of affirmance of the judgment of the trial court is due primarily, we respectfully assert, to a misapprehension of the effect of the erroneous admission of evidence as to the measure of damages during the trial and the attempted correction thereof by conflicting instructions at the close of the trial.

This is unmistakably demonstrated by the fact that there were three separate and distinct opinions written by this Honorable Court, in that, the majority opinion written by Honorable Justice Neterer stated that the evidence as to damage prior to the letter of June 2, 1931 was properly admitted; the Honorable Justice Mathews stated that the said evidence admitted for measure of damages prior to the letter of June 2, 1931 was erroneously admitted but that a certain instruction of the court set forth in his opinion cured said error; that the dissenting opinion of the Honorable Justice Wilbur stated emphatically that the said evidence admitted for the measure of damages prior to the letter of June 2, 1931 was in error and was not cured and could not have been cured.

The dissenting opinion of the Honorable Justice Wilbur clearly sets forth the facts as we see the issues and he declares:

“I do not believe the appellant had a fair trial on the question of damages in view of the contradictory ruling of the trial judge on the subject. I think the judgment should be reversed.”

The Honorable Justice Mathews in a concurring and dissenting opinion, as we see it, admits that the evidence as to damages received was in error but he thought it had been cured by the final instruction to the jury, which he points out, but we believe he does not give the same force and effect to the wording of the other instructions that he does to the specific one set out in his dissenting opinion, for all the way through the other instructions, as pointed out in the dissenting opinion of the Honorable Justice Wilbur, the jury of laymen could easily have been misled and never have understood that the court was attempting

in its final analysis of the case in the instructions to change the rulings it had made in the admission of the said evidence during the trial for the purpose of assessing damages.

For two days the trial court in its rulings led the jury to believe, and impressed upon the minds of the jurors, that the evidence as to the letters of 1928, 1929 and 1930 was all being introduced and was admissible for the purpose of showing the measure of damages and was the basis of the damage along with the letter of June 2, 1931.

It would have taken more than an ordinary layman sitting on the jury to distinguish the real difference that the court attempted to point out in its one instruction for there were apparent contradictions as the court continually referred in its instructions to "damages" and "acts" as if there had been more than one act of damage.

The jury, after hearing all the instructions with reference to the acts of damage as admitted by the court during the trial, naturally would think the court meant that the several letters that were introduced were introduced and were admissible to show separate damages for the separate years and were a basis of such damages.

The fact that there were three opinions written in this case by the three Justices who heard the argument on appeal, after studying the evidence and instructions, would indicate that the evidence and instructions must have been confusing even to legal minds, without considering what it might have been to the layman jury.

We all know how impossible it is for a jury to hear a great number of instructions read off at the close of a trial and get the fine points, in fact the turning points of the case, especially where they are told something different

in the instructions than they have been led to believe was the law during the trial and for what purpose the evidence was admitted.

The opinions written by the Honorable Justices Mathews and Wilbur clearly state that the admission of the evidence as to the measure of damages during the trial was in error.

The Honorable Justice Mathews in his opinion stated that the said error was cured by the last instruction given by the trial court, but said statement of opinion was without the citation of authorities and we submit to this Honorable Court that, based upon the hereinafter set forth authorities, the error in the admission of said evidence on measure of damages could not have been cured by the said instruction.

In the first place, the complaint for damages was based upon a letter written by the appellant, dated June 2, 1931, and the court during the process of the trial, which lasted two days before a jury, and in the presence of the jury, had the following questions come up which were all before any final instructions was given to the jury, and therefore during the course of the trial, while the evidence was coming in, the jury was advised that the evidence that was being introduced was for the purpose of assessing damages and for the measure of damages as was shown by the following statements:

“Mr. Sheehan: Your Honor, I wish to object to that testimony and have it stricken out on the ground that this is all prior to the date of the writing of the letter in the complaint, which is dated June 1, 1931, or June 2, 1931.

The Court: Mr. Balter, suppose that had been, what would be the importance of it?

Mr. Balter: Showing the measure of damages, Your Honor, now. This product French Veneer was destroyed as a business of the plaintiff on a certain date. She subsequently, maybe two or three years later, had to start all over again and try to sell a new product. We want to show the extent of the damage." [Tr. p. 156.]

"The Court: Is that the witness' statement that it was discontinued then?

Mr. Balter: Yes. I asked the witness that.

The Court: In 1929?

Mr. Balter: And for a period of several years the plaintiff had no product with May Company, and then when she did put a product on, at the suggestion of Mr. Strauss, because of reasons which he can explain, she put on a new product with a new name, meeting new sales resistance. The jury has a right to consider these elements in assessing the damages to be awarded." [Tr. p. 157.]

"Mr. Sheehan: They claim this letter that is the basis of this damage is dated June 2, 1931. Obviously, anything that transpired previously to that has no bearing on the letter because the letter was not in existence." [Tr. p. 157.]

"The Court: Let me see the file."

The Court then read the allegations of the complaint and stated:

"And the allegation is of general damage to the business of plaintiff. Why, then, is not this evidence admissible?

Mr. Sheehan: Because, Your Honor, this is three years prior to the time of writing the letter.

The Court: But the allegation in the complaint is that as a result of these various letters not confining them to any one.

Mr. Sheehan: But we are not apprised of anything else we are charged to libel except this thing that they put in here.

The Court: I think the allegation of the complaint that I have just read is clear and distinct to the effect that letters were written, is it not? Certainly it is, because I just read the allegations. Now, in the absence of a motion for particulars or something of that sort, I think the letters are admissible. They are already admitted, at any rate, and it is a matter for the jury to pass upon, to say whether the plaintiff suffered any damage, of course, and whether, if she did suffer damage, that was attributable or reasonably the result of the letters." [Tr. p. 158.]

"The Court: 'and that by reason of the said false, malicious and defamatory publication aforesaid,' singular. Now, if that is not broad enough to include all of those, because, remember that this is the basis of your damage.

Mr. Balter: Yes, Your Honor.

The Court: And if it is not broad enough to include those previous ones you can't claim damage on them.

Mr. Balter: I think it is broad enough, Your Honor. We are setting out a system by the defendant.

The Court: In the absence of a specific objection heretofore made as to what was included, or an analysis of this complaint, I would feel compelled to say that the basis of damage may reasonably be held to include all of the previous letters. Undoubtedly, I think that was the intention." [Tr. p. 160.]

Now, during the course of the trial, the above arguments and remarks of the court took place in front of the jury and naturally a jury sitting there listening to the evidence believed that the evidence, including the letters of 1928, 1929 and 1930 were all relevant as to damages, and the jury had that so firmly put in their minds by the remarks of the court that they as laymen would not be able to disregard the evidence without some real specific instruction and direction to that effect. At no place does the record show that the court withdrew the evidence or instructed the jury at any time to disregard the same. The only instruction that bears upon the subject at all was after the case was entirely over and the jury had listened to the evidence for two days as to what the damages consisted of under the court's remarks and then at the end of the trial, after argument to the jury, the court instructed them as per the instructions set out in the concurring and dissenting opinion of Judge Mathews.

The evidence clearly shows, as is so aptly set out in the dissenting opinion of Justice Wilbur, that the entire business of the plaintiff had been destroyed prior to the writing of the letters of June 2, 1931. There was not even a conflict in the evidence. She admitted that between 1928 and 1930 that she had lost her business and she become so disheartened that she gave up making her trips. Therefore, in 1931 when the letter upon which damages could be based was written she had already lost her business and there was nothing more to lose and if she had been damaged it would have been only nominal damages that could be based upon that letter, but the jury brought in a verdict of \$11,000.00 compensatory damages and \$9,000.00 punitive damages which shows that the jury considered the evidence of plaintiff's business during 1928,

1929, 1930 and 1931, as certainly after her business had been destroyed in 1930, as she admitted herself, there would be nothing further to destroy by writing a letter in 1931, and if the letter was written of one who had already sold their business there might be a nominal damage but it could not amount to anything more than a nominal amount as the business had already been disposed of or destroyed. There is no conflict on this evidence.

The complaint set forth the letter in *haec verba*, the letter of June 2, 1931 upon which the plaintiff claimed her damage, and of course the bringing of the suit was within one year, therefore, the defendant was not called upon, nor was it obliged to set up any statute of Limitations as all it had to do was to answer the complaint and the complaint based its damages resultant from the letter of June 2, 1931 and naturally in the answer one was not required to anticipate the plaintiff would attempt to go back into the years 1928, 1929 and 1930 for the purpose of showing damages, or of course the statute of limitations would have been set up.

We are confronted with the undisputed facts that the letter upon which the libel was based was June 2, 1931 and the admitted facts of the plaintiff that her business had been destroyed prior to that time, even to the extent that she was being supported by her sons. Therefore, the jury, even believing there had been some damage by the letter, had nothing to base any \$11,000.00 damages on for compensatory damages and not having a basis for the compensatory damages, the punitive damages were out of proportion and there could be no basis therefor, all of which we believe was due to the error in admitting evidence as to damages for the years 1928, 1929 and 1930,

and the statement of the court during the process of the trial that the evidence was all admitted for the purpose of showing damages.

“The general rule is that if evidence has been erroneously admitted during the trial, the error of its admission is cured by its subsequent withdrawal before the close of the trial or by clear peremptory instruction to the jury to disregard it. *Penn. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Specht v. Howard*, 16 Wall. 564, 21 L. Ed. 348; *Washington Gas Light Co. v. Lansden*, 172 U. S. 534-555, 43 L. Ed. 543; *Turner v. American Sec. Trust Co.*, 213 U. S. 257-267, 53 L. Ed. 788; *Union Pacific Ry. v. Thomas*, 152 Fed. 365-371; *Balaklala Copper Co. v. Reardon*, 220 Fed. 585-587; *Oates v. United States*, 233 Fed. 201-204; *Looker v. United States*, 240 Fed. 932-935. But there is an exception to this rule. It is that where the Appellate Court perceives from an examination of the record that the inadmissible evidence made such a strong impression upon the minds of the jury that its subsequent withdrawal, or the instruction to disregard it probably failed to irradiate the injurious effect of it from the minds of the jury, there the defeated party did not have a fair trial of his case and a new trial should be granted.”

Quigley v. United States, 19 Fed. (2d) 756-759.

“The general rule is that, if evidence erroneously admitted during the progress of the trial be distinctly withdrawn by the court, the error is cured; but it is otherwise if it appears that the impression made by the evidence on the jury is so strong or of such a character that it probably remains, notwithstanding the direction of the court. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L.

Ed. 543; *Trockmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663; *Turner v. American Security & Trust Co.*, 213 U. S. 574, 29 Sup. Ct. 420, 53 L. Ed. 788; *Armour & Co. v. Kollmeyer*, 88 C. C. A. 242, 161 Fed. 78, 16 L. R. A. (N. S.) 1110. The testimony of Eckfeldt covers 37 pages of the record, and it bore upon the important and vital issues touching the conduct of the plaintiff and the brakeman whose acts are alleged to have given rise to the cause of action. The plaintiff, Eckfeldt, and another witness, all of whom were trespassers riding on the train without lawful right, testified substantially to the same facts, and upon their testimony the plaintiff's case practically depended. The evidence improperly admitted was not confined to some particular fact, circumstance, or feature that was brought distinctly and clearly to the attention of the jury; but it was only identified by the court by the naming of the witness. *It was so voluminous and so interwoven and connected with the mass of plaintiff's evidence as to be incapable of adequate separation, and we think it was impossible for the jury, however desirous of obeying the direction of the court, to escape entirely the influence of it.*" (Italics ours.)

Chicago M. & St. P. Ry. Co. v. Newsome, 174 Fed. 394-6.

The case of *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543, is a very interesting case on the very points involved herein and is besides a libel case in itself, wherein there was an erroneous admission of evidence as to the wealth of one of the defendants and although the court attempted to correct its error and charged the jury that the punitive damages could not be

recovered, the Supreme Court of the United States held as follows:

“But it is said that the error, if any, was cured by the ruling of the court in respect to the request of defendant’s counsel that punitive damages should not be granted. We are not certain as to that. As we have said, the court gave no instruction to the jury that it could only consider the evidence in connection with the question of punitive damages. The remark of the court as to the object of the evidence was made to counsel and the court did not in any instruction given plainly limit the jury to its consideration for that purpose alone. The evidence was never withdrawn by the court, nor was the jury directed to take no notice of it. If the court admitted the evidence for one purpose only, and yet did not afterwards in terms withdraw it from the consideration of the jury, it was of such a nature that it still might affect the jury, even though the basis for its admission originally had disappeared. It is true the defendants did not in so many words ask the court to withdraw the evidence from the jury. It was, however, duly objected to when received and it was error to receive it. Under such circumstances, in order to cure the error, the court when deciding that punitive damages could not be recovered, should have plainly and in distinct language withdrawn the particular evidence from the jury. We cannot be certain that its effect was removed by that action of the court. In a case of this character where the line between compensatory and punitive damages is quite vague, and compensatory damages may be based upon the injury to the feelings and good name of the plaintiff, and where the amount even of such compensatory damages rests so largely in the discretion of the jury, we think it is utterly impracticable to say that, by merely charging the

jury that punitive damages cannot be recovered, the effect of the incompetent evidence as to wealth of one of the defendants was thereby removed or that the verdict of the jury can be held to have been based solely upon the competent evidence in the case."

While the evidence in the above case concerned the difference between compensatory and punitive damages, it is very similar to the evidence in the case before this Court, where the difference is as to the evidence as to when the damages begin and we only have to look at the dissenting opinion of the Honorable Justice Wilbur of this Court to show that the plaintiff had lost her entire business and that she even quit the struggle prior to the writing of the letter of June 2, 1931. It might be hard for a jury of laymen to separate the evidence in connection with damages and any losses she might have sustained prior to the writing of the letter, and the verdict of the jury shows that they did not give the instruction as to when the damage occurred any consideration for, if one loses a business by a fire, flood or by the depression and then a letter is written that is libelous, you cannot damage a business that has already been destroyed, so it must have been that the jury gave damages for the destruction of the business during the years 1928, 1929 and 1930.

We all know the effect of the admission of certain evidence upon a jury during the trial of a case over a period of several days, and we also know that it is practically impossible to correct any error that was made in the admission of inadmissible evidence by an instruction made later, even though the jury was specifically instructed not to consider such inadmissible evidence, either at the time it was admitted, during the trial, or when the instruc-

tions were given, and even if such evidence was specifically withdrawn by the court from the consideration of the jury, and we submit to this Honorable Court that in the case at bar, where the jury was never at any time instructed that the letters of the years 1928, 1929 and 1930 admitted for the purpose of measuring damages should not be considered for that purpose and such evidence was never at any time withdrawn from the consideration of the jury, that the impossibility stated above increases to absolute impossibility.

In a case where it is plain the jury did not understand the instruction or wilfully disregarded the same, the injured party, either plaintiff or defendant, must be protected by the Appellate Courts.

The amount of the jury's verdict in this case certainly shows that, if they understood or considered the court's instruction, they utterly disregarded the same, due to the fact that they could not have possibly given a judgment in the sum of \$20,000.00 based upon the letter dated June 2, 1931, as the uncontradicted evidence introduced by the plaintiff clearly shows that her home had been her place of business, even during the good times; that she had no equipment but mixed her polish in the garage at her home, so there could have been no loss in equipment. She testified her business was destroyed during the years 1928, 1929 and 1930 and that she had given up the struggle and had quit making trips, therefore, she had no business to lose after that and after the letter of June 2, 1931 was written upon which the jury could only base damages there was nothing further for her to lose and even any damages she might have had to her feelings had occurred prior to the time her business had disappeared.

Therefore, the only conclusion that can be reached is that the jury based its verdict on damages by going back over plaintiff's business for the years 1928, 1929 and 1930 and we feel that the large amount involved and the importance of the legal principles are such as to justify a further hearing herein, especially due to the fact that the verdict as given was obviously based upon inadmissible and erroneous evidence upon which this Honorable Court itself is divided as to the effect thereof.

Respectfully submitted,

BICKSLER, PARKE & CATLIN,

FRANK D. CATLIN,

WILLIAM E. WOODROOF,

PAUL V. SHEEHAN,

Attorneys for Appellant.

Certificate of Counsel.

I, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing is presented in good faith and in judgment of counsel for petitioner, is well founded and that it is not interposed for delay.

FRANK D. CATLIN,

Counsel for Petitioner.

United States
Circuit Court of Appeals

For the Ninth Circuit.

W. E. JAMES AND AGNES JAMES,
Appellants,
vs.

O. A. NELSON, as an individual, O. A. NELSON,
as a trustee, N. P. NELSON, CHARLES
HAWKINS and CHARLES McMAHAN,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.

FILED

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United States
Circuit Court of Appeals

For the Ninth Circuit.

W. E. JAMES AND AGNES JAMES,
Appellants,
vs.

O. A. NELSON, as an individual, O. A. NELSON,
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Appellees.

Transcript of Record

**Upon Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ants and appellees. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court for the Territory of Alaska,
Third Division.

No. S 356.

W. E. JAMES and AGNES JAMES,
Plaintiffs,
vs.

O. A. NELSON, as an individual, O. A. NELSON
as trustee, N. P. NELSON, CHARLES HAW-
KINS, and CHARLES McMAHAN,
Defendants.

COMPLAINT.

Come now the plaintiffs above named and for
their cause of action against the above named de-
fendants and each of them, complain and allege:

I.

That on and prior to the 4th day of February,
1930, the plaintiff W. E. James, by the right of dis-
covery and location of certain placer mining ground
and held by the performance of annual labor, sub-
ject to the paramount title of the United States of
America, was the owner of and entitled to the
immediate possession of the following described
placer mining claims, to-wit:

“Those certain placer mining claims, situated
upon Bonanza Creek, a tributary of Cathenda
Creek; on Gold Run Creek, a tributary of Gla-
cier Creek; on Cathenda Creek and on Little
Eldorado Creek, a tributary of Bonanza Creek;

all of said claims being in the White River Mining District of the Chisana Recording District, Territory of Alaska, and known and called as follows, to-wit:

Discovery of Bonanza Creek

No. 1 Above Discovery on Bonanza Creek

No. 5 Above Discovery on Bonanza Creek

No. 6 Above Discovery on Bonanza Creek

No. 14 Above Discovery on Bonanza Creek

No. 15 Above Discovery on Bonanza Creek

Discovery Fraction on Bonanza Creek

No. 5 Fraction Above Discovery on Bonanza
Creek

Discovery on Gold Run Creek

Discovery Annex on Gold Run Creek

No. 1 Cathenda Creek [2]

No. 1 Little Eldorado Creek

No. 3 Little Eldorado Creek

No. 1 Fraction Little Eldorado Creek.

No. 1 Gold Bug Bench on Little Eldorado
Creek

No. 2 Gold Bug Bench on Little Eldorado
Creek

No. 3 Gold Bug Bench on Little Eldorado
Creek

James Bench on Little Eldorado Creek,
the notices of which are all of record in the
office of the Recorder for Chisana Recording
Precinct, at Chisana, Alaska, to which records
reference is hereby made for a further and
more complete description of said claims, and
to saw mill and cabin located near the Post
Office of the Town of Chisana, Alaska, and to

one large cabin located in the town of Chisana, Alaska, and known as the James Cabin.”

II.

That on the 5th day of February, 1930, W. E. James, plaintiff herein and Agnes James, his wife, as parties of the first part, did make, execute and deliver a certain instrument in writing to the First Bank of Cordova, a banking corporation organized and existing under the laws of the Territory of Alaska, and doing business at Cordova in said Territory of Alaska, as the party of the second part, which said instrument in writing was given as security for the payment of the sum of Five Thousand One Hundred and Fifty and no/100 Dollars (\$5,150.00) in lawful money of the United States, together with interest thereon at the rate of twelve (12%) per centum per annum, according to the terms and conditions of four (4) certain promissory notes due one year after date, made by the parties of the first part payable to the party of the second part or order, and each of said notes providing for the payment of a reasonable sum to be fixed by the court, all as more fully appears from the original said mortgage, which said mortgage was and is recorded on September 30, 1932, in the Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson, Commissioner and ex-Officio Recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska, a certified copy of which is hereto attached and made a part of this complaint, marked

Exhibit A, and by reference hereto made a part hereof.

III.

That the plaintiffs, in the conduct of their mining operations upon the property hereinbefore described, incurred certain financial ob- [3] ligations, particularly to the Cash Store of Chitina, owned or managed or conducted by one O. A. Nelson, and on or about the 11th day of April, 1933, upon the representations and requests of the said O. A. Nelson, the said plaintiffs W. E. James and Agnes James did make and execute a conveyance in writing, transferring to the said O. A. Nelson as trustee, the right, title and interest of the said plaintiffs, the said O. A. Nelson, however, being designated in said instance as trustee; and plaintiffs aver that the trust created by such instrument was to O. A. Nelson solely as agent for the parties of the first part, for the purpose of permitting the said O. A. Nelson to negotiate with said First Bank of Cordova and *do* deliver title of and to said mining properties to the said First Bank of Cordova; and a copy of such instrument so described is attached to this complaint, marked Exhibit B, and by reference hereto made a part hereof.

IV.

Plaintiffs further allege that shortly prior to the 11th day of April, 1933, an action was instituted in the District Court for the Territory of Alaska by the First Bank of Cordova as plaintiff against the

plaintiffs in this action, W. E. James and Agnes James, for the purpose of securing a judgment of foreclosure and subsequent sale of the mining properties of these plaintiffs described in and covered by said mortgage, and which action was and is at the time of the filing of this complaint now pending on the docket of said court, notwithstanding the fact that on said 11th day of April, 1933, at Chisana, Alaska, the said O. A. Nelson as trustee, under the conveyance hereinbefore described, did accept such conveyance as conditional and did then and is on behalf of said First Bank of Cordova being thereunder authorized by said Bank, did agree to dismiss said action so pending as cause Number 594 on the docket of the Third Division Court, all as a partial consideration for the conveyance by plaintiffs herein to said Bank of said placer mining property so embraced as hereinbefore set forth in said mortgage, hereinbefore described, of the 5th day of February, 1930. [4]

V.

That in addition to the matters herein set forth as cause for the transfer by the said W. E. James and Agnes James of their placer mining property as described in said mortgage, hereinbefore referred to, the said defendant O. A. Nelson individually and as trustee for the First Bank of Cordova, being thereunder authorized to also pay certain outstanding indebtedness due to specifically named creditors of the said W. E. James, as evidenced in a certain memorandum in writing as furnished to the said

O. A. Nelson by the plaintiff Agnes James, at Chisana, Alaska, in the presence of witnesses on or about April 11, 1933; and the said O. A. Nelson, individually and as trustee, did further state and agree with the said plaintiff W. E. James that in consideration of the execution of a deed and conveyance to the said O. A. Nelson as trustee, that the said O. A. Nelson would pay all such outstanding indebtedness of the said W. E. James.

VI.

That the fraudulent representation and inducement of the said O. A. Nelson to Plaintiffs consisted of the following:

(a) That the First Bank of Cordova was taking over the property and that said Bank and the Chitina Cash Store, and O. A. Nelson as an individual, assumed the claims and indebtedness against the property herein described.

(b) That the conveyance to O. A. Nelson was a conveyance dated April 11, 1933, to the said O. A. Nelson, only for making the transfer of said property to the said First Bank of Cordova in the event and in consideration of the dismissal of the action pending in the District Court for the Territory of Alaska, Third Division, and the release, dismissing and satisfaction of the mortgage of February 5, 1930, so given as hereinbefore set forth by the *plaintiff* W. E. James and Agnes James, as parties of the first part to the said The First Bank of Cordova, party of the second part, and the satisfaction of said mortgage. [5]

(c) That the said O. A. Nelson did state and agree to and with the said W. E. James and Agnes James on the 11th day of April 1933, that in the event should the First Bank of Cordova, of Cordova, Alaska, not take over the placer mining properties of the plaintiffs in satisfaction of the mortgage, that he, the said O. A. Nelson, would return by the first mail to the said W. E. James said instrument of conveyance.

(d) And the defendant O. A. Nelson by fraudulent representation procured and induced the plaintiff to execute and deliver to the defendant O. A. Nelson, as trustee, a deed of the placer mining claims, hereinbefore described, conveying the same to the said defendant O. A. Nelson as trustee, by fraudulently representing to the plaintiffs that said deed of conveyance was in full satisfaction of all indebtedness outstanding and existing against the plaintiffs and/or the said W. E. James and Agnes James, husband and wife, and that the said The First Bank of Cordova would hold title of said ground in trust until said debts were paid and then return said mining ground to the said plaintiffs in a period of time stated by said O. A. Nelson to be a period of five years, and, plaintiffs relying upon said representations of the said O. A. Nelson, as trustee, did deliver such deed as and for the purpose herein stated and for no other purpose whatsoever.

VII.

That on or about the 17th day of December, 1933, the defendant O. A. Nelson executed and gave to

the defendant N. P. Nelson, some sort of a lease or lay permitting the said N. P. Nelson to work and operate a portion of the mining claims of the plaintiffs hereinbefore described in this complaint, and to extract the gold therefrom, all without the knowledge and consent of the plaintiffs and against their approval or authority.

VIII.

And that while the plaintiffs were such owners and entitled to the possession of all the above described placer mining ground, the said defendant N. P. Nelson unlawfully and wrongfully entered upon said placer min- [6] ing ground, ousted the plaintiffs therefrom and ever since that day has wrongfully and unlawfully withheld and still and now wrongfully withholds the possession of said property from the plaintiffs, and that the plaintiffs were on said date in possession of said property and entitled to the immediate possession thereof, all subject to the paramount title of the United States.

IX.

That on or about the 17th day of December, 1933, the defendant O. A. Nelson as trustee, executed and delivered to the defendant Charles Hawkins some sort of a lease or lay permitting the said Charles Hawkins to work and operate a portion of the mining claims of the plaintiffs hereinbefore described in this complaint, and to extract the gold therefrom, all without the knowledge and consent of the plaintiffs and against their approval or authority and

without authority on the part of the said O. A. Nelson so to do.

X.

And that while the plaintiffs were such owners and entitled to the possession of all the above described placer mining ground, the said defendant Charles Hawkins unlawfully and wrongfully entered upon said placer mining ground, ousted the plaintiffs therefrom and ever since the 17th day of December, 1933, has wrongfully and unlawfully withheld and still and now wrongfully withholds the possession of said property from the plaintiffs, and the plaintiffs were on said date in possession of said property and entitled to the immediate possession thereof, all subject to the paramount title of the United States.

XI.

That on or about the 17th day of December, 1933, the defendant O. A. Nelson as trustee, executed and delivered to Charles McMahan a pretended lease or lay permitting the said Charles McMahan to work and operate a portion of the mining claims of the plaintiffs hereinbefore described in this complaint and to extract the gold therefrom, all without the knowledge and consent of the plaintiffs and against their approval or authority and [7] without authority or right on the part of the said O. A. Nelson so to do.

XII.

And that while the plaintiffs were such owners and entitled to the possession of all the above de-

scribed placer mining ground, the said defendant Charles McMahan unlawfully and wrongfully entered upon said placer mining ground, ousted the plaintiffs therefrom and ever since the 17th day of December, 1933, has wrongfully and unlawfully withheld and still and now wrongfully withholds the possession of said property from the plaintiffs, and the plaintiffs were on said date in possession of said property and entitled to the immediate possession thereof, all subject to the paramount title of the United States.

XIII.

Plainiffs further aver that the value of the Chisana placer claims, described in this complaint, are in excess of the sum of Fifty Thousand Dollars (\$50,000.00) as a fair and approximate estimate of the ground not yet worked on said property, as based upon the recoveries of past years.

XIV.

(a) That the said defendant O. A. Nelson, neither as an individual nor as a trustee, has delivered to said plaintiffs and particularly to the plaintiff W. E. James, the notes and mortgage executed by the plaintiffs as hereinbefore described in this complaint, nor satisfied and discharged nor caused to be satisfied and discharged said mortgage upon the records.

(b) And the said O. A. Nelson has wholly failed, neglected and refused to cause to be dismissed that certain action numbered C-594 on the docket of the District Court for the Territory of Alaska, Third

Division, and in which said case the First Bank of Cordova, Alaska, is the plaintiff and the plaintiffs herein, W. E. James and Agnes James, husband and wife, are defendants therein.

XV.

That the defendant O. A. Nelson individually and as trustee, without right, continues and does exercise supervision and control over the placer mining properties of these plaintiffs; and under *an* pretended owner- [8] ship has issued leases and lays on said property for the purpose of the extraction of gold; and still further threatens to oust the plaintiffs from possession of said property and has refused and does now refuse to permit said plaintiffs to go upon said property or any part thereof, and has forcibly removed the plaintiff Mrs. Agnes James from her home and cabin, situate on said property, deprived her of her personal effects, clothing, furniture and articles of personal adornment, and refuses and still refuses to permit the plaintiff Agnes James to enter her own home in the cabin on the mining claim where she has resided for many years.

WHEREFORE, plaintiffs pray:

1. That the instrument described as a Deed and Bill of Sale, dated April 11, 1933, wherein W. E. James and Agnes James, husband and wife, of Chisana, Alaska, are designated parties of the first part and O. A. Nelson, trustee, of Chitina, Alaska,

designated as the party of the second part, be ordered delivered up and cancelled.

2. That this honorable court appoint a receiver of the property described in this complaint with the usual powers and duties and to be entitled to be present and receipt for all clean-ups of gold dust or gold nuggets extracted from the said mining property which may be mined or obtained by the said defendants and each of the whole of them, until the further order of this court in such regard made.

3. That pending the termination of this cause the said O. A. Nelson individually and as trustee, be restrained from in any manner exercising dominion, control and possession of the placer mining property described in this complaint.

4. And that plaintiffs have such other and further relief as may seem just and equitable to the court, and

5. For all proper costs and disbursements in this litigation including such reasonable sum as the court may allow as attorney's fees.

L. V. RAY,
Attorney for Plaintiffs. [9]

United States of America,
Territory of Alaska.—ss.

AGNES JAMES, being first duly sworn, on oath deposes and says that she is one of the plaintiffs in the above entitled action, that she has read the above and foregoing complaint, knows the contents thereof and believes the same to be true.

AGNES JAMES.

Subscribed and sworn to before me this 25 day of April, A. D., 1934.

[Notarial Seal]

L. V. RAY,

Notary Public in and for the Territory of Alaska.

My Commission expires March 24, 1938. [10]

EXHIBIT A.

MORTGAGE,

THIS INDENTURE, made this fifth day of February, 1930, between W. E. James and Agnes James, both residents of Chitina, Alaska, the parties of the first part, and the First Bank of Cordova, a banking corporation organized and existing under the laws of the Territory of Alaska, at Cordova, Alaska, the party of the second part.

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of Fifty one Hundred and Fifty Dollars (\$5,150) in lawful money of the United States to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, convey and confirm unto the said party of the second part, and to its successors and assigns, all of the right, title and interest, claim and demand, both legal and equitable, of, in and to those certain placer mining claims, situated upon Bonanza Creek, a tributary of Cathenda Creek; on Gold Run Creek, a tributary of Glacier Creek; on Cathenda Creek and on Little Eldorado Creek, a tributary of Bonanza Creek; all of the said claims

being in the White River Mining District of the Chisana Recording District, Territory of Alaska, and known as and called as follows, to-wit:

Discovery on Bonanza Creek,

No. 1 Above Discovery on Bonanza Creek

" 5 " " " "

" 6 " " " "

" 14 " " " "

" 15 " " " "

Discovery Fraction on Bonanza Creek

No. 5 Fraction Above Discovery on Bonanza Creek.

Discovery on Gold Run Creek.

Discovery Annex on Gold Run Creek

No. 1 Cathenda Creek

No. 1 Little Eldorado Creek.

No. 2 " " "

No. 3 " " " [11]

No. 1 Fraction on Little Eldorado Creek

No. 1 Gold Bug Bench on Little Eldorado Creek.

No. 2 " " " " " "

No. 3 " " " " " "

James Bench on Little Eldorado Creek.

notices of location of which are duly of record in the office of the recorder of the said Chisana Recording Precinct, at Chisana, Alaska, to which records reference is hereby made for a further and more complete identification of said claims, and to sawmill and cabin located near the Post Office of the town of Chisana, and to one large cabin located in the town of Chisana and known as the James cabin.

To have and to hold the above described placer claims, saw mill and two cabins, together with all and singular the tenements, hereditaments, rights and privileges thereunto belonging or otherwise appertaining, and to all houses, buildings, pipe, giants, flumes, tools, machinery and equipment of every kind and nature upon the said aforementioned properties, and together with all personal property of any and every kind and nature placed upon or connected with the said premises in the future, and all gold dust mined or extracted from the said placer mining claims, all of which gold dust the parties of the first part hereby promise to deliver to the party of the second part to apply upon said mortgage debt.

This conveyance is intended as a mortgage to secure the payment of Fifty One Hundred and Fifty Dollars (\$5,150.00) in lawful money of the United States, together with interest thereon at the rate of Twelve (12) per centum per annum and *and* all additional costs, charges and attorney fees, according to the terms and conditions of four (4) promissory notes, due one day after date, made by the parties of the first part, bearing interest from date of said notes at the rate of twelve (12) per centum per annum, one of the said notes being dated December 29th, 1929 for the principal sum of One Thousand Dollars (\$1,000.00), one of said notes being dated January 14th, 1930, for the principal sum of One Thousand Dollars (\$1,000.00), one of said notes being dated January 31st, 1930 for the principal sum of Three Hundred Dol- [12] lars (\$300.00), and

one of said notes being dated February 5th, 1930 for the principal sum of Twenty eight Hundred and Fifty Dollars (\$2,850) each of said four notes being payable to the order of the said party of the second part and each of said four notes providing for the payment of a reasonable attorney's fee to be fixed by the court in case suit of action being brought on said notes or any one of them.

But in case default is made in the payment of principal or interest of said promissory notes, or any one of them, or any part thereof, when the same shall become due and payable according to the terms and conditions thereof, then the said party of the second part, its successors and assigns, is hereby empowered to sell the said premises and property with all and every of the appurtenances, or any part thereof, in the manner prescribed by the law, and out of the money arising from the sale to retain the whole of the said principal and interest, whether the same shall then be due or not, together with the costs and charges of making such sale, and the over plus, if any there be, shall be paid by the party or parties making such sale, on demand, to the parties of the first part their heirs or assigns. And in any suit, action or other proceeding that may be had for the recovery of the principal sum, or interest, or both on said notes, or any one of them or any part thereof, or on this mortgage it shall and may be lawful for the party of the second part, its *successors* and assigns, to include in any judgment that may be recovered as *council* fees and *and* charges of attorneys and *council* employed in such suit, a reasonable sum to be fixed by the court, or in case of settlement

or payment being made after suit has been commenced and before final judgment or decree has been entered thereon, an attorney's fee of ten per centum of the amount paid in such settlement shall be taxed as part of the costs of such suit or action or proceeding, as well as all payments that the said party of the second part, its successors and assigns may be obliged to make for its, his or their security by insurance or on account of any taxes, liens, charges, incumberances, or assessments whatsoever on said premises, or any part thereof.

It is agreed that the said parties of the first part may remain [13] in possession of all of the personal property included within the *the* provisions of this mortgage, until in default.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals on the day and year hereinabove first written.

W. E. JAMES

AGNES JAMES.

Executed in the presence of

M. N. CHASE.

ANNA LEAK.

United States of America

Territory of Alaska

Third Division—ss.

THIS IS TO CERTIFY, that on this 5th day of February, 1930, before me the undersigned, a United States Commissioner, in and for Chitina Precinct, Third Division, Territory of Alaska, at Chitina, Alaska, duly appointed, qualified and sworn, personally appeared before me W. E. James

and Agnes James, each to me personally known, and to me known to be the identical individuals described in and who executed the within and foregoing mortgage, and they acknowledged to me, each for himself and herself, and not one for the other, that they executed the same voluntarily and freely for the uses and purposes therein mentioned.

WITNESS MY HAND and official seal the day and year in this certificate first above written.

[Seal]

O. A. NELSON

United States Commissioner.

United States of America

Territory of Alaska

Third Division—ss.

W. E. James and Agnes James, being first duly sworn, each for himself and herself, and not one for the other, deposes and says: I am one of the mortgagors named in the foregoing mortgage; that said mortgage is made in good faith to secure the amount named therein and without any design to hinder delay or defraud any creditor or creditors.

W. E. JAMES

AGNES JAMES.

Subscribed and sworn to before me this 5th day of February, 1930.

[Seal]

O. A. NELSON

United States Commissioner [14]

Filed for record by the First Bank of Cordova at
4 P M Sept. 30, 1930.

O. A. NELSON,

Recorder.

United States of America
Territory of Alaska
Chitina Precinct.

I, O. A. NELSON, United States Commissioner and ex-officio Recorder for the Chitina Precinct, Territory of Alaska, hereby certify that the foregoing four typewritten pages is a true, full and exact copy of the therein named mortgage as the same appears in the records of this office.

[Commissioner's Seal] O. A. NELSON,
United States Commissioner, Chitina.

[15]

EXHIBIT B.

DEED AND BILL OF SALE.

THIS INDENTURE, Made this 11th day of April, 1933, between W. E. James and Agnes James, husband and wife, of Chisana, Alaska, the parties of the first part, and O. A. Nelson, Trustee, of Chitina, Alaska, the party of the second part, WITNESSETH:

The said parties of the first part, for and in consideration of the sum of One (\$1.00) and other good and valuable consideration by them received do by these presents Grant, Bargain, Sell Convey and Confirm unto the said party of the second part, and to his heirs and assigns, the following Described Property:

Placer Mining Claims: Discovery on Bonanza Creek, No. 1 Above Discovery on Bonanza Creek, No. 5 Above Discovery on Bonanza Creek, No. 6 Above Discovery on Bonanza Creek, No. 14 Above Discovery on Bonanza Creek, No. 15 Above Discovery on Bonanza Creek, Discovery Fraction on Bonanza Creek, No. 5 Fraction Above Discovery on Bonanza Creek, Discovery on Gold Run Creek, Discovery Annex on Gold Run Creek, No. 1 Chatenda Creek, No. 1 Little Eldorado Creek, No. 3 Little Eldorado Creek, Discovery Bench on Little Eldorado Creek, No. 1 Discovery Bench on Little Eldorado Creek, No. 2 Discovery Bench on Little Eldorado Creek, No. 3 Discovery Bench on Little *Eldorad* Creek, No. 1 Fraction on Little Eldorado Creek, No. 1 Gold Bug Bench on Little Eldorado Creek, No. 2 Gold Bug Bench on Little Eldorado Creek, No. 3 Gold Bug Bench on Little Eldorado Creek, and James Bench on Little Eldorado Creek; all situated on Gold Run and Bonanza Creeks and tributaries, in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska; and also together with a saw-mill and cabin located near the Post Office in the town of Chisana, Alaska, and one large cabin located in the town of Chisana and known as the **James Cabin**; and also together with all houses, buildings Pipe Giants, flumes, tools, machinery and equipment of every kind and nature upon the said mentioned properties, or any of them, or in any manner connected therewith. To have and to hold the same, together with the dips, angles, spurs, ores minerals,

tenements, hereditaments and appurtenances [16] thereto belonging or in any wise appertaining, forever.

The said parties of the first part, their heirs, executors and administrators, do by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs, *executurs* and administrators, all and singular, the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances, unto the said party of the second part, his heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will Warrant and forever Defend.

IN WITNESS WHEREOF, the said Parties of the first part have hereunto set their hands and seals the day and year first above written.

[Seal]

W. E. JAMES,

[Seal]

AGNES JAMES

Signed, Sealed and delivered in the presence of
LUELLE JOHNSTON
C. H. GILLAM.

Filed for record by O. A. Nelson at 10 AM on
April 15th, 1933.

O. A. NELSON

Recorder.

United States of America
Territory of Alaska
Chitina Precinct.—ss.

I, O. A. NELSON, United States Commissioner and ex-officio Recorder for the Chitina Precinct, Territory of Alaska, hereby certify that the foregoing two typewritten pages is a true, full and exact copy of the therein named DEED AND BILL OF SALE as the same appears in the records of this office.

[Commissioner's Seal] O. A. NELSON
United States Commissioner,
Chitina.

[Endorsed]: Filed Apr. 27, 1934. [17]

[Title of Court and Cause.]

DEMURRER.

Comes now N. P. Nelson, one of the defendants above named, and appearing for himself alone and not for his co-defendants demurs to the complaint of the plaintiffs above named on file herein on the following grounds:

1. That the same does not state facts sufficient to constitute a cause of action.

Dated at Cordova, Alaska, this 14th day of June, 1934.

DONOHOE & DONOHOE

Attorneys for Defendant
N. P. Nelson. [18]

United States of America
Territory of Alaska.—ss.

THOMAS M. DONOHUE, being first duly sworn,
upon his oath says:

That he is attorney for the defendant above named; that he served the foregoing demurrer upon L. V. Ray, Esq., the attorney for the plaintiffs therein on the 14th day of June, 1934, by depositing in the United States Post Office at Cordova, Alaska, a full, true and correct copy thereof, by him certified to be such copy, enclosed in an envelope addressed to said L. V. Ray, at Seward, Alaska, that being the residence of the said L. V. Ray, with the postage prepaid thereon, on said date. That there is regular United States mail service between said Cordova and Seward, Alaska.

THOMAS M. DONOHUE

Subscribed and sworn to before me this 14th day of June, 1934.

[Notarial Seal]

C. W. MINAKER

Notary Public for Alaska. My commission expires
Dec. 1, 1937.

[Endorsed]: Filed Jun. 14, 1934. [19]

[Title of Court and Cause.]

DEMURRER.

Comes now Charles Hawkins, one of the defendants above named, and appearing for himself alone and out for his co-defendants demurs to the complaint of the plaintiffs above named on file herein on the following grounds:

1. That the same does not state facts sufficient to constitute a cause of action.

Dated at Cordova, Alaska, this 14th day of June, 1934.

DONOHOE & DONOHOE

Attorneys for Defendant

Charles Hawkins. [20]

United States of America
Territory of Alaska.—ss.

THOMAS M. DONOHOE, being first duly sworn, upon his oath says:

That he is attorney for the defendant above named; that he served the foregoing demurrer upon L. V. Ray, Esq., the attorney for the plaintiffs therein on the 14th day of June, 1934, by depositing in the United States Post Office at Cordova, Alaska, a full, true and correct copy thereof, by him certified to be such copy, enclosed in an envelope addressed to said L. V. Ray, at Seward, Alaska, that being the residence of the said L. V. Ray, with the postage prepaid thereon, on said date. That there is regular United States mail service between said Cordova and Seward, Alaska.

THOMAS M. DONOHOE

Subscribed and sworn to before me this 14th day of June, 1934.

[Notarial Seal] C. W. MINAKER

Notary Public for Alaska. My commission expires
Dec. 1, 1937.

[Endorsed]: Filed Jun. 14, 1934. [21]

[Title of Court and Cause.]

DEMURRER.

Comes now Charles McMahan, one of the defendants above named, and appearing for himself alone and not for his co-defendants demurs to the complaint of the plaintiffs above named on file herein on the following grounds:

1. That the same does not state facts sufficient to constitute a cause of action.

Dated at Cordova, Alaska, this 14th day of June, 1934.

DONOHOE & DONOHOE

Attorneys for Defendant

Charles McMahan [22]

United States of America

Territory of Alaska.—ss.

THOMAS M. DONOHOE, being first duly sworn, upon his oath says:

That he is attorney for the defendant above named; that he served the foregoing demurrer upon L. V. Ray, Esq., the attorney for the plaintiffs therein on the 14th day of June, 1934, by depositing in the United States Post Office at Cordova, Alaska, a full, true and correct copy thereof, by him certified to be such copy, enclosed in an envelope addressed to said L. V. Ray at Seward, Alaska, that being the residence of the said L. V. Ray, with the postage prepaid thereon, on said date. That there is regular United States mail service between said Cordova and Seward, Alaska.

THOMAS M. DONOHOE

Subscribed and sworn to before me this 14th day of June, 1934.

[Notarial Seal] C. W. MINAKER
Notary Public for Alaska. My commission expires
Dec. 1, 1937.

[Endorsed]: Filed Jun. 14, 1934. [23]

[Title of Court and Cause.]

DEMURRER.

Comes now O. A. Nelson, one of the defendants above named both as an individual and as trustee, and appearing for himself alone and not for his co-defendants demurs to the complaint of the plaintiffs above named on file herein on the following grounds:

1. That the same does not state facts sufficient to *constitute* a cause of action.

Dated at Cordova, Alaska, this 14th day of June, 1934.

DONOHOE & DONOHOE

Attorneys for Defendant
O. A. Nelson. [24]

United States of America
Territory of Alaska.—ss.

THOMAS M. DONOHOE, being first duly sworn, upon his oath says:

That I am attorney for the defendant above named; that I served the foregoing demurrer upon

L. V. Ray, Esq., the attorney for the plaintiffs therein on the 10th day of July, 1934, by depositing in the United States Post Office at Cordova, Alaska, a full, true and correct copy thereof, by me certified to be such copy, enclosed in an envelope addressed to the said L. V. Ray at Seward, Alaska, that being the residence of the said L. V. Ray, with the postage prepaid thereon, on said date. That there is regular United States mail service between said Cordova and Seward, Alaska.

THOMAS M. DONOHOE

Subscribed and sworn to before me this 10th day of July, 1934.

[Notarial Seal]

CLYDE R. ELLIS

Notary Public for Alaska. My commission expires
June 11, 1938.

[Endorsed]: Filed Jul. 11, 1934. [25]

[Title of Court and Cause.]

HEARING ON DEMURRER.

Now at this time this cause came regularly on for hearing on defendant O. A. Nelson's demurrer to plaintiffs' complaint, the plaintiffs being represented by L. V. Ray, Esq., and the defendant being represented by Thos. M. Donohoe, Esq.

Whereupon, after argument by respective counsel, the Court took the matter under advisement.

Entered Court Journal No. S-5 Page No. 177
Dec. 14, 1934. [26]

[Title of Court and Cause.]

OPINION ON DEMURRER.

This matter having come on for hearing upon the demurrer of each of the defendants herein, and the court having taken the matter under advisement, holds that the demurrer should be overruled for the reason that the court is of the opinion that the complaint, while it asks for a cancellation of a certain instrument, is not for the cancellation of the trust therein set forth, but is for the removal of the trustee, the defendant O. A. Nelson; and that the defendants O. A. Nelson, N. P. Nelson, Charles Hawkins, and Charles *McMann*, are beneficiaries of the trust set forth in the complaint, and as such have an interest in the subject matter of the trust and also have an interest in the selection of a new trustee, as prayed for in the complaint.

Dated at Seward, Alaska, this 17th day of December, 1934.

SIMON HELLENTHAL

Judge.

[Endorsed]: Filed Dec. 18, 1934. [27]

[Title of Court and Cause.]

ORDER OVERRULING DEMURRERS OF ALL
DEFENDANTS.

The above matter came regularly on for hearing upon the demurrers interposed by each and all the above-named defendants to the complaint of plain-

tiffs, at a special session of the above styled court held at Seward within the Territory and Division aforesaid, on December 14th, 1934; Plaintiffs appearing by their attorney of record, L. V. Ray, Esquire, and the defendants all appearing by their attorney of record, Thomas M. Donohoe, Esquire; argument was had by respective attorneys; whereupon the court did take the matter under advisement and thereafter on December 18th, 1934, did announce in open court its decision upon said demurrer and filed in said cause a memorandum decision in writing thereon, directing that each and all of said demurrers be overruled.

WHEREFORE, IT IS ORDERED that the demurrers of each and all of the defendants in said cause, interposed as against the complaint of plaintiffs, be and the same are hereby over-ruled, with twenty days allowance of time in which defendants shall file and serve answers.

To the above and foregoing order exception is allowed to each of said defendants, as they may be advised.

Done in Open Court this 18th day of December, A. D. 1934.

SIMON HELLENTHAL

District Judge

Entered Court Journal No. S-5 Page No. 180 Dec. 18, 1934.

[Endorsed]: Filed Dec. 18, 1934. [28]

[Title of Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
N. P. NELSON.

Comes now defendant N. P. Nelson above named, and answering the complaint of the plaintiffs above named, for himself alone and not for his co-defendants, admits, denies and alleges as follows:

I.

Referring to Paragraph I of plaintiffs said complaint, defendant admits the same.

II.

Referring to Paragraph II of plaintiffs said complaint, defendant admits the same.

III.

Referring to Paragraph III of plaintiffs said complaint, defendant admits that plaintiffs incurred the indebtedness therein mentioned, particularly to the Cash Store of Chitina; admits that on or about the 11th day of April, 1933, plaintiffs did make and execute a deed to O. A. Nelson, but denies each and every other allegation in said paragraph contained.

IV.

Referring to Paragraph IV of plaintiffs said complaint, defendant admits that prior to the 11th day of April, 1933, The First Bank of Cordova commenced an action in the District Court for the Territory of Alaska against the plaintiffs herein for

the foreclosure of the mortgage described; admits that the same was pending at the time of filing of the complaint herein; and alleges that he has no knowledge, information or belief sufficient [29] to enable him to answer any of the other allegations in said paragraph contained, and therefore he denies each and every other allegation in said paragraph contained.

V.

Defendant, referring to Paragraph V of plaintiffs complaint, alleges that he has no knowledge, information or belief sufficient to enable him to answer any of the allegations therein contained, and therefore denies the same, and the whole thereof.

VI.

Referring to Paragraph VI of plaintiffs said complaint, defendant alleges that he has no knowledge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and therefore he denies the same and the whole thereof.

VII.

Referring to Paragraph VII of plaintiffs said complaint, defendant admits that O. A. Nelson gave the defendant a lease to a certain portion of the mining claims described in plaintiffs complaint, but alleges that the same was dated April 17, 1933, instead of December 17, 1933; and denies each and every other allegation in said paragraph contained.

VIII.

Referring to Paragraph VIII of plaintiffs said complaint, defendant denies the same and each and every allegation therein contained.

IX.

Referring to Paragraph IX of plaintiffs said complaint, defendant allegess that he has no knowledge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and therefore he denies each and every allegation, and the whole thereof.

X.

Referring to Paragraph X of plaintiffs said complaint, defendant alleges that he has no knowledge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and there- [30] fore he denies each and every allegation, and the whole thereof.

XI.

Referring to Paragraph XI of plaintiffs said complaint, defendant alleges that he has no knowledge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and therefore he denies each and every allegation, and the whole thereof.

XII.

Referring to Paragraph XII of plaintiffs said complaint, defendant alleges that he has no knowl-

edge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and therefore he denies each and every allegation, and the whole thereof.

XIII.

Referring to Paragraph XIII of plaintiffs complaint, defendant denies the same, and each and every allegation therein contained.

XIV.

Referring to Paragraph XIV of plaintiffs said complaint, defendant denies each and every allegation therein contained.

XV.

Referring to Paragraph XV of plaintiffs complaint, defendant admits that defendant O. A. Nelson continues and does exercise supervision and control over the placer mining properties heretofore owned by plaintiffs, and has given to defendant a lease upon a portion of the same; denies that such supervision and control is without right, and denies each and every other allegation in said paragraph contained.

And by way of affirmative defense and counterclaim, defendant alleges as follows:

I.

That on or about the 11th day of April, 1933, plaintiffs W. E. James and Agnes James, for a valuable consideration, made, executed and delivered to O. A. Nelson a certain deed and bill of

sale covering the following described real and personal property: [31]

Placer Mining Claims: Discovery on Bonanza Creek, No. 1 Above Discovery on Bonanza Creek, No. 5 Above Discovery on Bonanza Creek, No. 6 Above Discovery on Bonanza Creek, No. 15 Above Discovery on Bonanza Creek, No. 15 Above Discovery on Bonanza Creek, Discovery Fraction on Bonanza Creek, No. 5 Fraction Above Discovery on Bonanza Creek, Discovery on Gold Run Creek, Discovery Annex on Gold Run Creek, No. 1 Cathenda Creek, No. 1 Little Eldorado Creek, No. 3 Little Eldorado Creek, Discovery Bench on Little Eldorado Creek, No. 1 Discovery Bench on Little Eldorado Creek, No. 2 Discovery Bench on Little Eldorado Creek, No. 3 Discovery Bench on Little Eldorado Creek, No. 1 Fraction on Little Eldorado Creek, No. 1 Gold Bug Bench on Little Eldorado Creek, No. 2 Gold Bug Bench on Little Eldorado Creek, No. 3 Gold Bug Bench on Little Eldorado Creek, and James Bench on Little Eldorado Creek; all situated on Gold Run and Bonanza Creeks and tributaries, in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska; and also together with a sawmill and cabin located near the Post Office in the town of Chisana, Alaska, and one large cabin located in the town of Chisana, Alaska,

and known as the James Cabin; and also together with all houses, buildings, pipe, giants, flumes, tools, machinery and equipment of every kind and nature upon the said mentioned properties, or any of them, or in any manner connected therewith, together with the dips, angles, spurs, ores, minerals, tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining.

II.

That thereafter plaintiffs W. E. James and Agnes James acknowledged and told and informed the defendant that they had so made, executed and delivered such deed to defendant O. A. Nelson.

III.

That thereafter and on the 17th day of April, 1933, defendant O. A. Nelson made, executed and delivered to defendant a lease or lay covering the following described mining claims:

No. 5 Above Discovery on Bonanza Creek, No. 5 Fraction Above Discovery on Bonanza Creek, No. 6 Above Discovery on Bonanza Creek, No. 1 and No. 1 Fraction on Little El Dorado Creek, Nos. 1, 2 and 3 Discovery Bench on Little El Dorado Creek, all being placer mining claims located on Bonanza Creek and tributaries in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska, and being a portion of the

ground theretofore owned by the plaintiffs herein;

the said lease or lay to remain in full force and effect to and until the first day of October, 1942.

IV.

That defendant thereupon entered into the possession of said min- [32] ing claims with the full knowledge and consent of the plaintiffs herein, and every since said date has been, and now is, in the lawful and peaceful possession thereof.

V.

That said lease ever since said 17th day of April, 1933, has been, and now is, in full force and effect, and was entered into with the full knowledge of the plaintiffs herein.

VI.

That the sum of One Hundred Dollars (\$100.00) is a reasonable sum to be allowed defendant for attorneys fees in defending this action.

WHEREFORE, having fully answered plaintiffs complaint, defendant prays that plaintiffs take nothing by reason thereof, but that he recover his costs and disbursements in this action incurred, and a reasonable attorneys fee in the sum of One Hundred Dollars (\$100.00); that the lease made, executed and delivered to defendant by O. A. Nelson on the 17th day of April, 1933, covering the above described property be declared to be in full force

and effect, and that plaintiffs, and each of them, be restrained from in any manner interfering therewith; and for such other and further relief as to the Court may seem just and equitable.

DONOHOE & DONOHOE,
Attorneys for Defendant N. P. Nelson.

United States of America,
Territory of Alaska—ss.

THOMAS M. DONOHOE, being first duly sworn upon his oath, says:

I am an attorney for the defendant above named, and make this affidavit of verification in his behalf for the reason that defendant is not now at Cordova, Alaska, the place where this verification is made, nor within one hundred miles thereof; that I have read said Answer, know the contents thereof, and believe the same to be true.

THOMAS M. DONOHOE.

Subscribed and sworn to before me this 7th day of January, 1935.

[Notarial Seal] C. W. MINAKER,
Notary Public for Alaska. My Commission expires
December 1, 1937. [33]

[Endorsed]: Filed Jan. 7, 1935. [34]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America,
Territory of Alaska—ss.

THOMAS M. DONOHOE, being first duly sworn upon his oath, says:

That he is attorney for the defendant N. P. Nelson in the above entitled action; that he served the foregoing Answer upon L. V. Ray, Esq., attorney for plaintiffs, at Cordova, Alaska, on the 7th day of January, 1935, by depositing a true copy thereof, certified to be such true copy by affiant, in the United States post office at Cordova, Alaska, enclosed in an envelope with the postage prepaid and addressed to the said L. V. Ray at Seward, Alaska, that being his address.

That the said L. V. Ray is a resident of the town of Seward, Alaska and that there is regular United States mail service between the town of Cordova, Alaska, and the town of Seward, Alaska.

THOMAS M. DONOHOE,

Subscribed and sworn to before me this 7th day of January, 1935.

[Notarial Seal] C. W. MINAKER,
Notary Public for Alaska. My Commission expires
December 1, 1937.

[Endorsed]: Filed Jan. 7, 1935. [35]

[Title of Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
CHARLES HAWKINS

Comes now defendant Charles Hawkins above named, and answering the complaint of the plaintiffs above named, for himself alone and not for his co-defendants, admits, denies and alleges as follows:

I.

Referring to Paragraph I of plaintiffs said complaint, defendant admits the same.

II.

Referring to Paragraph II of plaintiffs said complaint, defendant admits the same.

III.

Referring to Paragraph III of plaintiffs said complaint, defendant admits that plaintiffs incurred the indebtedness therein *mention*, particularly to the Cash Store of Chitina; admits that on or about the 11th day of April, 1933, plaintiffs did make and execute a deed to O. A. Nelson, but denies each and every other allegation in said paragraph contained.

IV.

Referring to Paragraph IV of plaintiffs said complaint, defendant admits that prior to the 11th day of April, 1933, The First Bank of Cordova commenced an action in the District Court for the Territory of Alaska against the plaintiffs herein for the foreclosure of the mortgage described; admits that

the same was pending at the time of filing of the complaint herein; and alleges that he has no knowledge, information or belief sufficient to enable [36] him to answer any of the other allegations in said paragraph contained, and therefore he denies each and every other allegation in said paragraph contained.

V.

Defendant, referring to Paragraph V of plaintiffs complaint, alleges that he has no knowledge, information or belief sufficient to enable him to answer any of the allegations therein contained, and therefore denies the same, and the whole thereof.

VI.

Referring to Paragraph VI of plaintiffs said complaint, defendant alleges that he has no knowledge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and therefore he denies the same and the whole thereof.

VII.

Referring to Paragraph VII of plaintiffs said complaint, defendant alleges that he has no knowledge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and therefore he denies each and every allegation, and the whole thereof.

VIII.

Referring to Paragraph VIII of plaintiffs said complaint, defendant alleges that he has no

knowledge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and therefore he denies each and every allegation, and the whole thereof.

IX.

Referring to Paragraph IX of plaintiffs said complaint, defendant admits that O. A. Nelson gave defendant a lease to a certain portion of the mining claims described in plaintiffs complaint, but alleges that the same was dated June 3, 1933, instead of December 17, 1933, and further alleges that under date of February 19, 1934, O. A. Nelson, defendant herein, made, executed and delivered to defendant an additional lease covering another portion of the property described in said complaint; and denies each and every other allegation in said paragraph contained. [37]

X.

Referring to Paragraph X of plaintiffs said complaint, defendant denies the same, and each and every allegation therein contained.

XI.

Referring to Paragraph XI of plaintiffs said complaint, defendant alleges that he has no knowledge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and therefore he denies each and every allegation, and the whole thereof.

XII.

Referring to Paragraph XII of plaintiffs said complaint, defendant alleges that he has no

knowledge, information or belief sufficient to enable him to answer any of the allegations in said paragraph contained, and therefore he denies each and every allegation, and the whole thereof.

XIII.

Referring to Paragraph XIII of plaintiffs complaint, defendant denies the same, and each and every allegation therein contained.

XIV.

Referring to Paragraph XIV of plaintiffs said complaint, defendant denies each and every allegation therein contained.

XV.

Referring to Paragraph XV of plaintiffs complaint, defendant admits that defendant O. A. Nelson continues and does exercise supervision and control over the placer mining properties heretofore owned by plaintiffs, and has given to defendant a lease upon a portion of the same; denies that such supervision and control is without right, and denies each and every other allegation in said paragraph contained.

And by way of affirmative defense and counterclaim, defendant alleges as follows:

I.

That on or about the 11th day of April, 1933, plaintiffs W. E. James and Agnes James, for a valuable consideration, made, executed and delivered to O. A. Nelson a certain deed and bill of

sale covering the following described real and personal property:

Placer Mining Claims: Discovery on Bonanza Creek, No. 1 Above Discovery on Bonanza Creek, No. 5 Above Discovery on Bonanza Creek, No. 6 Above Discovery on Bonanza Creek, No. 15 Above Discovery on Bonanza Creek, No. 15 Above Discovery on Bonanza Creek, Discovery Fraction on Bonanza Creek, No. 5 Fraction Above Discovery on Bonanza Creek, Discovery on Gold Run Creek, Discovery Annex on Gold Run Creek, No. 1 Cathenda Creek, No. 1 Little Eldorado Creek, No. 3 Little Eldorado Creek, Discovery Bench on Little Eldorado Creek, No. 1 Discovery Bench on Little Eldorado Creek, No. 2 Discovery Bench on Little Eldorado Creek, No. 3 Discovery Bench on Little Eldorado Creek, No. 1 Fraction on Little Eldorado Creek, No. 1 Gold Bug Bench on Little Eldorado Creek, No. 2 Gold Bug Bench on Little Eldorado Creek, No. 3 Gold Bug Bench on Little Eldorado Creek, and James Bench on Little Eldorado Creek; all situated on Gold Run and Bonanza Creeks and tributaries; in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska; and also together with a sawmill and cabin located near the Post Office in the town of Chisana, Alaska, and one large cabin located in the town of Chisana, Alaska, and known as the James Cabin; and also together with all houses,

buildings, pipe, giants, flumes, tools, machinery and equipment of every kind and nature upon the said mentioned properties, or any of them, or in any manner connected therewith, together with the dips, angles, spurs, ores, minerals, tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining.

II.

That thereafter plaintiffs W. E. James and Agnes James acknowledged and told and informed the defendant that they had so made, executed and delivered such deed to defendant O. A. Nelson.

III.

That thereafter and on the 3rd day of June, 1933, defendant O. A. Nelson made, executed and delivered to defendant a lease or lay covering the following described mining claims:

Discovery on Bonanza Creek, No. 1 Above Discovery on Bonanza Creek and No. 1 *Chatenda* Creek, being placer mining claims located on Bonanza Creek and tributaries in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska, and being a portion of the ground theretofore owned by the plaintiffs herein;

the said lease or lay to remain in full force and effect to and until the first day of October, 1937. That thereafter and on the 19th day of February, 1934, defendant O. A. Nelson made, executed and de-

livered to defendant a lease or lay covering the following described mining claims: [39]

Discovery Fraction on Bonanza Creek, being a placer mining claim located on Bonanza Creek and tributaries in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska;

and being a portion of the ground theretofore owned by the plaintiffs herein; the said lease or lay to remain in full force and effect to and until the first day of October, 1937.

IV.

That defendant thereupon entered into the possession of said mining claims with the full knowledge and consent of the plaintiffs herein, and every since said date has been, and now is, in the lawful and peaceful possession thereof.

V.

That since said 3rd day of June, 1933 and the 19th day of February, 1934 said leases have been, and now are, in full force and effect, and were entered into with the full knowledge and consent of the plaintiffs herein.

VI.

That the sum of One Hundred Dollars (\$100.00) is a reasonable sum to be allowed defendant for attorneys fees in defending this action.

WHEREFORE, having fully answered plaintiffs complaint, defendant prays that plaintiffs take nothing by reason thereof, but that he recover his costs and disbursements in this action incurred, and

a reasonable attorneys fee in the sum of One Hundred Dollars (\$100.00); that the leases made, executed and delivered to defendant by O. A. Nelson on the 3rd day of June, 1933 and the 19th day of February, 1934, covering the above described property, be declared to be in full force and effect, and that plaintiffs, and each of them, be restrained from in any manner interfering therewith; and for such other and further relief as to the Court may seem just and equitable.

DONOHOE & DONOHOE

Attorneys for Defendant

Charles Hawkins.

United States of America,
Territory of Alaska.—ss.

THOMAS M. DONOHOE, being first duly sworn upon his oath, says: [40]

I am an attorney for the defendant above named, and make this affidavit of verification in his behalf for the reason that defendant is not now at Cordova, Alaska, the place where this verification is made, nor within one hundred miles thereof; that I have read said Answer, know the contents thereof, and believe the same to be true.

THOMAS M. DONOHOE

Subscribed and sworn to before me this 7th day of January, 1935.

[Notarial Seal] C. W. MINAKER

Notary Public for Alaska. My Commission expires
December 1, 1937.

[Endorsed]: Filed Jan 7 1935. [41]

[Title of Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska.—ss.

THOMAS M. DONOHOE, being first duly sworn upon his oath, says:

That he is attorney for the defendant Charles Hawkins in the above entitled action; that he served the foregoing Answer upon L. V. Ray, Esq., attorney for plaintiffs, at Cordova, Alaska, on the 7th day of January, 1935, by depositing a true copy thereof, certified to be such true copy by affiant, in the United States post office at Cordova, Alaska, enclosed in an envelope with the postage prepaid and addressed to the said L. V. Ray at Seward, Alaska, that being his address.

That the said L. V. Ray is a resident of the town of Seward, Alaska and that there is regular United States mail service between the town of Cordova, Alaska, and the town of Seward, Alaska.

THOMAS M. DONOHOE

Subscribed and sworn to before me this 7th day of January, 1935.

[Notarial Seal] C. W. MINAKER
Notary Public for Alaska. My Commission expires
December 1, 1937.

[Endorsed]: Filed Jan 7 1935. [42]

[Title of Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
O. A. NELSON

Comes now defendant O. A. Nelson, above named, and answering the complaint of the plaintiffs above named for himself alone and not for his co-defendants, admits, denies and alleges as follows:

I.

Referring to Paragraph I of plaintiffs said complaint, defendant admits the same.

II.

Referring to Paragraph II of plaintiffs said complaint, defendant admits the same.

III.

Referring to Paragraph III of plaintiffs said complaint, defendant admits that plaintiffs, in the conduct of their mining operations upon the property described, incurred certain financial obligations, particularly to the Cash Store of Chitina, managed and conducted by defendant, and admits that on or about the 11th day of April, 1933, plaintiffs did make, execute and deliver a deed to defendant, conveying all the right, title and interest of plaintiffs in and to said described mining property to defendant individually, and denies that the same was executed to him as trustee, and defendant denies each and every other allegation in said paragraph contained.

IV.

Referring to Paragraph IV of plaintiffs said complaint, defendant admits that prior to the 11th day of April, 1933, an action was instituted [43] in the District Court for the Territory of Alaska by The First Bank of Cordova against the plaintiffs herein, and admits that said action was pending at the time of the filing of the complaint herein; admits that on or about the 11th day of April, 1933, he promised that said action would be dismissed; denies that he was acting as trustee; and denies each and every other allegation in said paragraph contained, save as hereinafter admitted and/or alleged.

V.

Referring to Paragraph V of plaintiffs said complaint, defendant denies the same, and each and every allegation therein contained.

VI.

Referring to Paragraph VI of plaintiffs complaint, defendant denies the same and each and every allegation therein contained.

VII.

Referring to Paragraph VII of plaintiffs said complaint, defendant admits that he made, executed and delivered to defendant N. P. Nelson a lease upon a portion of the mining claims mentioned and described in said complaint, but alleges that the date of said lease was the 17th day of April, 1933, and not the 17th day of December, 1933; and

denies each and every other allegation in said paragraph contained.

VIII.

Referring to Paragraph VIII of plaintiffs said complaint, defendant denies the same, and each and every allegation in said paragraph contained.

IX.

Referring to Paragraph IX of plaintiffs said complaint, defendant admits that he made, executed and delivered to defendant Charles Hawkins a lease to a portion of the mining claims described in said complaint, but alleges that said lease was dated June 3, 1933, and not December 17, 1933; and denies each and every other allegation in said paragraph contained.

X.

Referring to Paragraph X of plaintiffs complaint defendant denies the same, and each and every allegation therein contained.

XI.

Referring to Paragraph XI of plaintiffs said complaint, defendant [44] admits that he made, executed and delivered to Charles McMahan a lease to a portion of the mining claims in said complaint described, and denies each and every other allegation in said paragraph contained.

XII.

Referring to Paragraph XII of plaintiffs said complaint, defendant denies the same, and each and every allegation therein contained.

XIII.

Referring to Paragraph XIII of plaintiffs said complaint, defendant denies the same, and each and every allegation therein contained.

XIV.

Referring to Paragraph XIV of plaintiffs said complaint, defendant denies the same, and each and every allegation therein contained, save and except as may hereafter be admitted or alleged.

XV.

Referring to Paragraph XV of plaintiffs said complaint, defendant admits that he continues and does exercise supervision and control over the placer mining property mentioned and described in said complaint; denies that he does so without right; admits that he has issued leases for portions of said property; and denies each and every other allegation in said paragraph contained.

And for a separate and further answer, and by way of cross-complaint, defendant alleges:

I.

That on and prior to the 4th day of February, 1930, plaintiff W. E. James was the owner, subject to the paramount title of the United States of America, of certain placer mining claims situated on Bonanza Creek and other creeks tributary and adjacent thereto, all located in the White River mining District of the Chitina Recording Precinct, then Chisana Recording District, Territory of

Alaska, mentioned and described in the deed attached hereto, marked Exhibit A, and by reference incorporated in and made a part hereof.

II.

That on or about the 5th day of February, 1930, plaintiffs, in con- [45] sideration of the sum of \$5,150.00, did made, execute and deliver to The First Bank of Cordova, a banking corporation of Cordova, Alaska, a mortgage covering the property mentioned and described in plaintiffs exhibit "A", by reference incorporated in and made part hereof; that said mortgage was recorded in the Chitina Recording Precinct at Chitina, Third Division, Territory of Alaska, on or about the 30th day of September, 1932.

III.

That plaintiffs in the conduct of their mining operations became greatly indebted to the Chitina Cash Store, of which defendant is a part owner.

IV.

That prior to the 11th day of April, 1933, an action was instituted in the District Court for the Territory of Alaska, Third Division, by The First Bank of Cordova as plaintiff against the plaintiffs in this action, W. E. James and Agnes James, for the purpose of securing a judgment of foreclosure and sale of the mining properties described in and covered by said mortgage.

V.

That subsequent to the commencement of the action above mentioned by The First Bank of Cordova against plaintiffs, defendant and The First Bank of Cordova proposed to plaintiffs that if they would convey said property to defendant, he would hold the same as trustee to and until the indebtedness mentioned was paid in full, and would then return said property to plaintiffs; that they further proposed to plaintiffs that during the time defendant held said property as trustee he should have full power and authority to make and give any valid leases or lays upon any part or portion of the property that he might desire, and for a period of time not to exceed ten years.

VI.

That on or about the 11th day of April, 1933, defendant went to Chisana, Alaska, the place where plaintiffs were then living, and discussed with plaintiffs the proposed trust agreement above mentioned. That plaintiffs then and at that time offered to defendant, as a substitute therefor and in lieu of any such trust agreement, and in consideration of their complete and final release and satisfaction from all indebtedness due to The First Bank of [46] Cordova and the Chitina Cash Store only, and in addition to plaintiffs receiving a lease to a plot of ground to be selected by plaintiff W. E. James, one hundred by one hundred feet on Bonanza Creek at the mouth of Little Eldorado Creek, to last for the mining season of 1933, to make, execute and

deliver to defendant a full and complete and outright deed to the mining properties theretofore owned by plaintiffs. That defendant accepted said offer, and on or about the 11th day of April, 1933, plaintiffs W. E. James and Agnes James made, executed and delivered to defendant a deed, a true copy of which is hereto attached, marked Exhibit "A", and is by reference incorporated in and made a part hereof. That although the word "trustee" is used after the name of defendant in said deed, it was intended to be and specifically agreed by and between plaintiffs and defendant that such deed was an outright conveyance, and not in any manner or sense to create a trust.

VII.

That thereafter and under date of April 16, 1933, defendant W. E. James in writing confirmed the deed so made, executed and delivered as above mentioned as an outright deed, and not as in any manner creating a trust. That on or about the 20th day of April, 1933, defendant made, executed and delivered to plaintiff W. E. James a lease to a plot of ground one hundred by one hundred feet on claim No. 6 Above Discovery on Bonanza Creek at the mouth of Little Eldorado Creek; that subsequently defendant, acting by and through N. P. Nelson at Chisana, Alaska, offered and tendered to plaintiffs a satisfaction of the mortgage held by The First Bank of Cordova, cancelled notes previously held by said Bank, and receipt in full from the Chitina Cash Store, but that plaintiffs refused to

accept the same; that defendant had paid the principal amounts, together with accrued interest of said notes and mortgage to The First Bank of Cordova by paying said Bank cash in full for the same.

VIII.

That upon the making, execution and delivery of the deed above mentioned, plaintiffs quit and surrendered the possession of the property [47] therein described to defendant, and that plaintiff procured and turned over and delivered to defendant certain of the personal property covered by said deed and bill of sale which he had in his possession, all freely and voluntarily, and without coercion; that ever since said date defendant has been, and now is, in the peaceful possession thereof.

IX.

That on the 17th day of April, 1933, defendant made, executed and delivered to defendant N. P. Nelson, a lease to last to and until October 1, 1942, covering the following described property:

No. 5 Above Discovery on Bonanza Creek, No. 5 Fraction Above Discovery on Bonanza Creek, No. 6 Above Discovery on Bonanza Creek, No. 1 and No. 1 Fraction on Little Eldorado Creek, Nos. 1, 2 and 3 Discovery Bench on Little Eldorado Creek, all being placer mining claims located on Bonanza Creek and tributaries in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska, and being a por-

tion of the ground theretofore owned by the plaintiffs herein.

That on June 3, 1933, defendant made, executed and delivered to defendant Charles Hawkins a lease to last to and until October 1, 1937, to the following described property:

No. 1 on *Chatenda* Creek, Discovery and No. 1 Above Discovery on Bonanza Creek, in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska.

That also on February 19, 1934, defendant made, executed and delivered to defendant Charles Hawkins, a lease to last to and until *Ocotber* 1, 1937, covering:

Discovery Fraction on Bonanza Creek in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska.

That each of said defendants, after the execution of the leases above described, entered into the possession of the property mentioned, and ever since said dates have been, and now are, in the peaceful possession of the property mentioned; that at the dates of the leases mentioned, namely, to defendant N. P. Nelson on April 17, 1933, and to defendant Charles Hawkins on June 3, 1933, said defendants N. P. Nelson and Charles Hawkins entered into possession of the ground covered thereby with the full knowledge and with [48] the consent of the plaintiffs herein.

X.

That in addition to the leases mentioned, defendant made, executed and delivered to defendant Charles McMahan a lease to a certain portion of the ground mentioned and described in said deed, but that the said Charles McMahan had surrendered the same, and no longer has any interest therein.

XI.

That immediately after the execution of said deed on the 11th day of April, 1933, The First Bank of Cordova instructed Messrs. Donohoe & Dimond to dismiss the action then pending in the District Court for the Territory of Alaska against the plaintiffs herein for foreclosure of the mortgage hereinbefore described; that said suit or action, same being Cause No. C-594 in said Court, has since been so dismissed by The First Bank of Cordova.

XII.

That defendant, by virtue of said deed, became the owner of the property therein described on the 11th day of April, 1933, subject to the paramount title of the United States of America to the mining claims therein mentioned and described, and entered into the possession thereof with the full knowledge and consent of the plaintiffs herein; and ever since said date has been, and now is, in the lawful possession thereof.

XIII.

That the sum of Five Hundred Dollars is a rea-

sonable sum to be allowed defendant as attorney fees in defending this action.

WHEREFORE, having fully answered plaintiffs complaint, defendant prays this Honorable Court for a judgment dismissing the same; for his costs and disbursements in this action incurred; for a reasonable attorney fee in the sum of Five Hundred Dollars (\$500.00); that defendant be adjudged and decreed to be the sole and lawful owner of the property described in the foregoing complaint filed herein; and that defendant's title thereto be quieted as against any title, interest or claim therein or thereto by said plaintiffs, or either of them; and that defendant have such other and further relief as to the Court may seem just [49] and equitable.

DONOHOE & DONOHOE

Attorneys for Defendant

O. A. Nelson.

United States of America,
Territory of Alaska.—ss.

THOMAS M. DONOHOE, being first duly sworn upon his oath, says:

I am an attorney for the defendant above named, and make this affidavit of verification in his behalf for the reason that defendant is not now at Cordova, Alaska, the place where this verification is made, nor within one hundred miles thereof; that I have read said Answer, know the contents thereof, and believe the same to be true.

THOMAS M. DONOHOE

Subscribed and sworn to before me this 7th day of January, 1935.

[Notarial Seal] C. W. MINAKER

Notary Public for Alaska. My Commission expires December 1, 1937. [50]

EXHIBIT "A".

DEED AND BILL OF SALE

THIS INDENTURE, Made this 11th day of April, 1933, between W. E. James and Agnes James, husband and wife, of Chisana, Alaska, the parties of the first part, and O. A. Nelson, Trustee, of Chitina, Alaska, the party of the second part, WITNESSETH:

The said parties of the first part, for and in consideration of the sum of One (\$1.00) and other good and valuable consideration by them received do by these presents, Grant, Bargain, Sell, Convey and Confirm unto the said party of the second part, and to his heirs and assigns, the following Described Property:

Placer Mining Claims: Discovery on Bonanza Creek, No. 1 Above Discovery on Bonanza Creek, No. 5 Above Discovery on Bonanza Creek, No. 6 Above Discovery on Bonanza Creek, No. 15 Above Discovery on Bonanza Creek, No. 15 Above Discovery on Bonanza Creek, Discovery Fraction on Bonanza Creek, No. 5 Fraction Above Discovery on Bonanza Creek, Discovery on Gold Run Creek,

Discovery Annex on Gold Run Creek, No. 1 Cathenda Creek, No. 1 Little Eldorado Creek, No. 3 Little Eldorado Creek, Discovery Bench on Little Eldorado Creek, No. 1 Discovery Bench on Little Eldorado Creek, No. 2 Discovery Bench on Little Eldorado Creek, No. 3 Discovery Bench on Little Eldorado Creek, No. 1 Fraction on Little Eldorado Creek, No. 1 Gold Bug Bench on Little Eldorado Creek, No. 2 Gold Bug Bench on Little Eldorado Creek, No. 3 Gold Bug Bench on Little Eldorado Creek, and James Bench on Little Eldorado Creek; all situated on Gold Run and Bonanza Creeks and tributaries, in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska; and also together with a saw-mill and cabin located near the Post Office in the town of Chisana, Alaska, and one large cabin located in the town of Chisana and known as the James Cabin; and also together with all houses, buildings, pipe, giants, flumes, tools, machinery and equipment of every kind and nature upon the said mentioned properties, or any of them, or in any manner connected therewith, to have and to hold the same, together with the dips, angles, spurs, ores, minerals, tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, forever. [51]

The said parties of the first part, their heirs, executors and administrators, do by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs, execu-

tors and administrators, all and singular, the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances, unto the said party of the second part, his heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will Warrant and forever Defend.

IN WITNESS WHEREOF, the said Parties of the first part have hereunto set their hands and seals the day and year first above written.

[Seal] W. E. JAMES

[Seal] AGNES JAMES

Signed, sealed and delivered in the presence of
LUELLA JOHNSTON
C. H. GILLAM

Filed for record by O. A. Nelson at 10 A M on
April 15th, 1933.

O. A. NELSON

Recorder

United States of America

Territory of Alaska

Chitina Precinct—ss.

I, O. A. Nelson, United States Commissioner and ex-officio Recorder for the Chitina Precinct, Territory of Alaska, hereby certify that the foregoing two typewritten pages is a true, full and exact copy of the therein named DEED AND BILL OF SALE as the same appears in the records of this office.

(Signed) O. A. NELSON

United States Commissioner,
Chitina

[Endorsed]: Filed Jan 7 1935. [52]

[Title of Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

THOMAS M. DONOHOE, being first duly sworn upon his oath, says:

That he is attorney for the defendant O. A. Nelson in the above entitled action; that he served the foregoing Answer upon L. V. Ray, Esq., attorney for plaintiffs, at Cordova, Alaska, on the 7th day of January, 1935, by depositing a true copy thereof, certified to be such true copy by affiant, in the United States post office at Cordova, Alaska, enclosed in an envelope with the postage prepaid and addressed to the said L. V. Ray at Seward, Alaska, that being his address.

That the said L. V. Ray is a resident of the town of Seward, Alaska and that there is regular United States mail service between the town of Cordova, Alaska, and the town of Seward, Alaska.

THOMAS M. DONOHOE

Subscribed and sworn to before me this 7th day of January, 1935.

[Notarial Seal] C. W. MINAKER
Notary Public for Alaska. My Commission expires
December 1, 1937.

[Endorsed]: Filed Jan 7 1935. [53]

[Title of Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
CHARLES McMAHAN

Comes now defendant Charles McMahan above named, and answering the complaint of the plaintiffs above named, for himself alone and not for his co-defendants, admits, denies and alleges as follows:

I.

Answering Paragraphs I and II of plaintiffs said complaint, defendant admits the same.

II.

Referring to Paragraphs III, IV, V, VI, VII, VIII, IX, X, XIII, XIV and XV, defendant denies the same, and each and every allegation therein contained, except as may hereafter be admitted and/or alleged.

III.

Referring to Paragraph XI of plaintiffs said complaint, defendant admits that defendant O. A. Nelson made, executed and delivered to defendant a lease to a certain portion of the mining claims in said complaint described, and denies each and every other allegation therein contained.

IV.

Referring to Paragraph XII of plaintiffs said complaint, defendant denies the same, and each and every allegation therein contained.

And by way of affirmative defense, defendant alleges that on or about the 11th day of April, 1933,

plaintiffs W. E. James and Agnes James, made, executed and delivered to O. A. Nelson, a deed and bill of sale covering the property therein described and situated at Chisana, Chitina Recording Precinct, Territory of Alaska. [54]

II.

That thereafter defendant O. A. Nelson made, executed and delivered to defendant a lease covering a portion of the mining claims mentioned and described in said deed, and that defendant, with the full knowledge and consent of plaintiffs, entered into the possession thereof; that plaintiffs informed defendant that they had so deeded said property to the said defendant O. A. Nelson, and confirmed and made no objection to defendant's taking possession thereof.

III.

That on or about the 1st day of July, 1934, defendant surrendered said lease and the property covered thereby to defendant O. A. Nelson, which surrender was accepted by the said O. A. Nelson, and defendant no longer has any interest therein, or any part thereof.

WHEREFORE, having fully answered plaintiffs complaint, defendant prays that the same may be dismissed, and that he recover his costs and disbursements in this action incurred, and for such further and other relief as to the Court may seem just and equitable.

DONOHUE & DONOHUE

Attorneys for Defendant

Charles McMahan.

United States of America,
Territory of Alaska.—ss.

THOMAS M. DONOHUE, being first duly sworn upon his oath, says:

I am an attorney for the defendant above named, and make this affidavit of verification in his behalf for the reason that defendant is not now at Cordova, Alaska, the place where this verification is made, nor within one hundred miles thereof; that I have read said Answer, know the contents thereof, and believe the same to be true.

THOMAS M. DONOHUE

Subscribed and sworn to before me this 7th day of January, 1935.

[Notarial Seal] C. W. MINAKER
Notary Public for Alaska. My Commission expires
December 1, 1937.

[Endorsed]: Filed Jan 7 1935. [55]

[Title of Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

THOMAS M. DONOHUE, being first duly sworn upon his oath, says:

That he is attorney for the defendant Charles McMahan in the above entitled action; that he served the foregoing Answer upon L. V. Ray, Esq.,

attorney for plaintiffs, at Cordova, Alaska, on the 7th day of January, 1935, by depositing a true copy thereof, certified to be such true copy by affiant, in the United States post office at Cordova, Alaska, enclosed in an envelope with the postage prepaid and addressed to the said L. V. Ray at Seward, Alaska, that being his address.

That the said L. V. Ray is a resident of the town of Seward, Alaska and that there is regular United States mail service between the town of Cordova, Alaska, and the town of Seward, Alaska.

THOMAS M. DONOHOE

Subscribed and sworn to before me this 7th day of January, 1935.

[Notarial Seal] C. W. MINAKER

Notary Public for Alaska. My Commission expires
December 1, 1937.

[Endorsed]: Filed Jan 7 1935. [56]

[Title of Court and Cause.]

REPLY TO ANSWER OF O. A. NELSON,
DEFENDANT.

COME now the Plaintiffs, by and through their attorneys of record, L. V. RAY and LADY WILLIE FORBUS, and replying to the Answer and Affirmative Defense of the above named Defendant, admit, deny and allege the following:

FIRST: Replying to Paragraphs I, II, III and IV of said Defendant's Affirmative Defense, Plaintiffs admit the same.

SECOND: Replying to Paragraphs V, VI, VIII, XII and XIII of said Defendant's Affirmative Defense, Plaintiffs deny same.

THIRD: Replying to Paragraphs X and Xi of said Defendant's Affirmative Defense, Plaintiffs have no knowledge upon which to base a belief, and, therefore, deny the same.

FOURTH: Replying to Paragraph VII of said Defendant's Affirmative Defense, Plaintiffs admit the execution of the lease to Plaintiffs therein mentioned, admit said Defendant tendered certain papers purporting to be as described in said paragraph and that Plaintiffs refused to accept the same; and Plaintiffs deny each and every other allegation therein contained.

FIFTH: Replying to Paragraph IX of said Defendant's Affirmative Defense, Plaintiffs have no knowledge upon which to base a belief as to the first six paragraphs therein, and, therefore, deny the same. Plaintiffs admit that the Defendants entered into possession of the property described in the seventh paragraph therein, and deny each and every allegation otherwise contained therein.

WHEREFORE, Plaintiffs pray that the Affirmative Defense and Cross-Complaint of said Defendant be dismissed, and that they be granted judgment [57] as prayed for in their original complaint.

L. V. RAY

LADY WILLIE FORBUS

Attorneys for Plaintiffs.

Cordova, Alaska.

United States of America
Territory of Alaska—ss.

W. E. JAMES, being first duly sworn, upon oath
deposes and says:

That he is one of the Plaintiffs in the above en-
titled action; that he has read the foregoing Reply,
knows the contents thereof, and believes the same to
be true.

W. E. JAMES

Subscribed and sworn to before me on this 8th
day of February, 1935.

L. V. RAY

Notary Public, in and for the Territory of Alaska.

My commission expires March 24, 1938.

[Endorsed]: Filed Feb 13 1935. [58]

[Title of Court and Cause.]

REPLY TO ANSWER OF N. P. NELSON,
DEFENDANT.

COME now the Plaintiffs, by and through their
attorneys of record, L. V. RAY and LADY
WILLIE FORBUS, and replying to the Answer
and Affirmative Defense of the above named De-
fendant, admit deny and allege the following:

FIRST: Replying to Paragraphs I, II, IV, V
and VI of said Defendant's Affirmative Defense,
Plaintiffs deny the same.

SECOND: Replying to Paragraph III of said Defendant's Affirmative Defense, Plaintiffs have no knowledge upon which to base a belief, and, therefore, deny the same.

WHEREFORE, Plaintiffs pray that the Affirmative Defense and Cross-Complaint of said Defendant be dismissed, and that they be granted judgment as prayed for in their original complaint.

L. V. RAY

LADY WILLIE FORBUS

Attorneys for Plaintiffs.

Cordova, Alaska.

United States of America

Territory of Alaska.—ss.

W. E. JAMES, being first duly sworn, upon oath deposes and says:

That he is one of the Plaintiffs in the above entitled action; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

W. E. JAMES

Subscribed and sworn to before me on this 8th day of February, 1935.

L. V. RAY

Notary Public, in and for the Territory of Alaska.

My Commission Expires Mch. 28, 1928.

[Endorsed]: Filed Feb 13 1935. [59]

[Title of Court and Cause.]

REPLY TO ANSWER OF CHARLES
HAWKINS, DEFENDANT.

COME now the Plaintiffs, by and through their attorneys of record, L. V. RAY and LADY WILLIE FORBUS, and replying to the Answer and Affirmative Defense of the above named Defendant, admit, deny and allege the following:

FIRST: Replying to Paragraphs I, II, IV, V and VI of said Defendant's Affirmative Defense, Plaintiffs deny the same.

SECOND: Replying to Paragraph III of said Defendant's Affirmative Defense, Plaintiffs have no information upon which to base a belief, and, therefore, deny the same.

WHEREFORE, Plaintiffs pray that the Affirmative Defense and Cross-Complaint of said Defendant be dismissed, and that they be granted judgment as prayed for in their original complaint.

L. V. RAY

LADY WILLIE FORBUS

Attorneys for Plaintiffs.

Cordova, Alaska.

United States of America
Territory of Alaska—ss.

W. E. JAMES, being first duly sworn, on oath deposes and says: That he is one of the Plaintiffs in the above entitled action; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

W. E. JAMES

Subscribed and sworn to before me this 8th day of February, 1935.

L. V. RAY

Notary Public, Territory of Alaska. My Commission Expires Mch 28, 1938.

[Endorsed]: Filed Feb 13 1935. [60]

[Title of Court and Cause.]

REPLY TO ANSWER OF CHARLES
McMAHAN, DEFENDANT.

COME now the Plaintiffs, by and through their attorneys of record, L. V. RAY and LADY WILLIE FORBUS, and replying to the Answer and Affirmative Defense of the above named Defendant, admit, deny and allege the following:

FIRST: Replying to Paragraph I of said Defendant's Affirmative Defense, Plaintiffs deny the same.

SECOND: Replying to Paragraphs II and III of said Defendant's Affirmative Defense, Plaintiffs have no knowledge upon which to base a belief as to certain portions of said Paragraphs and, therefore, deny each and every allegation contained in the same.

WHEREFORE, Plaintiffs pray that the Affirmative Defense and Cross-Complaint of said Defendant be dismissed, and that they be granted judgment as prayed for in their original complaint.

L. V. RAY

LADY WILLIE FORBUS

Attorneys for Plaintiffs.
Cordova, Alaska.

United States of America
Territory of Alaska.—ss.

W. E. JAMES, being first duly sworn, upon oath
deposes and says:

That he is one of the Plaintiffs in the above entitled action; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

W. E. JAMES

Subscribed and sworn to before me on this 8th
day of February, 1935.

L. V. RAY

Notary Public, in and for the Territory of Alaska.

My Commission Expires Mch. 24, 1938.

[Endorsed]: Filed Feb 13 1935. [61]

[Title of Court and Cause.]

MOTION TO AMEND COMPLAINT BY
INTERLINEATION.

COME now the Plaintiffs, through their attorneys of record, L. V. RAY and LADY WILLIE FORBUS, and move the Court for leave to amend their Complaint in the above entitled action by interlineation as follows:

I. That leave be granted to strike out the words "within possession of" in Paragraph I of said Complaint, and in lieu thereof to interline the words "was the owner of".

II. That leave be granted to amend Paragraph VI of Plaintiffs' Complaint by inserting the following words at the beginning of said paragraph:

“That the fraudulent representations and inducements of the said O. A. Nelson to Plaintiffs consisted of the following:”

III. That leave be granted to add the following at the end of paragraph I of Plaintiffs' prayer for relief:

“That the Court adjudge the Defendant, O. A. Nelson, to be a trustee by operation of law during the period he has held said purported ‘Deed and Bill of Sale’ to said property, and that an accounting of the gold extracted from said mining ground be allowed for the period so held.”

THIS motion is based upon the records and files in the above entitled cause.

L. V. RAY &

LADY WILLIE FORBUS

Attorneys for Plaintiffs.

Cordova, Alaska.

[Endorsed]: Filed Feb 13 1935. [62]

[Title of Court and Cause.]

HEARING ON PLAINTIFFS' MOTION TO
AMEND COMPLAINT BY INTERLINEA-
TION.

Now at this time this cause came on regularly for hearing on plaintiffs' motion to amend complaint by

interlineation, the plaintiffs being represented by their counsel, L. V. Ray, Esq. and Lady Willie Forbus, and the defendants being represented by their counsel, Thos. M. Donohoe, Esq.

After argument by respective counsel, the Court being fully and duly advised in the premises,

IT IS ORDERED that all of the first two amendments of said motion be allowed and the Clerk is directed to make such amendments on the original complaint filed herein, and

IT IS FURTHER ORDERED that the third amendment of said motion be, and it is hereby, overruled, and

IT IS FURTHER ORDERED that defendants' answers to the pleadings, as amended, stand as filed.

Entered Court Journal No. C-4 Page No. 359 Feb. 13 1935. [63]

[Title of Court and Cause.]

DECREE

BE IT REMEMBERED That on the 14th day of February, 1935, the above entitled cause came on regularly for hearing before the HON. SIMON HELLENTHAL, Judge of the District Court for the Territory of Alaska, Third Division, sitting as a Court of Equity at Cordova, Alaska, upon the Complaint of Plaintiffs as amended, and the Cross-Complaint and Affirmative Defense of the Defendants appearing separately, and the Reply of the Plaintiffs thereto, the Plaintiffs appearing in

person and through their attorneys of record, L. V. RAY and LADY WILLIE FORBUS, and the Defendants, O. A. NELSON and N. P. NELSON appearing in person and through their attorneys of record, DONOHUE & DONOHUE, the Defendants, CHARLES HAWKINS and CHARLES McMAHAN not appearing; whereupon the Court proceeded with the hearing; and the Plaintiffs having introduced testimony in their belief said cause was continued to February 15, 1935; whereupon the Court resumed the hearing and the Plaintiffs introduced further testimony in their behalf and rested; thereupon the Defendants, O. A. NELSON and N. P. NELSON, introduced testimony in their behalf and rested; and the Court having read and considered the pleadings and exhibits therein, and having heard the argument of respective counsel, and being further fully advised in the premises; and having heretofore made and entered its Findings of Fact and Conclusions of Law in writing and filed the same:

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED and DECREED That that certain Deed and Bill of Sale executed by the Plaintiffs, W. E. JAMES and AGNES JAMES, husband and wife, to the Defendant, O. A. NELSON, as Trustee, [67] bearing date April 11th, 1933, recorded on April 15th, 1933, in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson as Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Division,

Territory of Alaska, be and the same hereby is annulled, cancelled and set aside.

IT IS FURTHER ORDERED, ADJUDGED and DECREED That that certain Lease executed by the Defendant, O. A. NELSON, to the Defendant, N. P. NELSON, bearing date April 11th, 1933, recorded on _____ in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson, as Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska, be and the same hereby is declared to be null and void and is hereby set aside.

IT IS FURTHER ORDERED, ADJUDGED and DECREED That that certain Lease executed by the Defendant, O. A. NELSON, to the Defendant, CHARLES HAWKINS, being dated June 3rd, 1933, recorded on _____ in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson, as Commissioner and Ex-Officio Recorded for the Chitina Recording Precinct, Third Division, Territory of Alaska, be and the same hereby is declared to be null and void and is hereby set aside.

IT IS FURTHER ORDERED, ADJUDGED and DECREED That that certain Lease executed by the Defendant, O. A. NELSON, to the Defendant, CHARLES HAWKINS, being dated February 19th, 1934, recorded on _____ in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson, as Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Divi-

sion, Territory of Alaska, be and the same hereby is declared null and void and is hereby set aside.

IT IS FURTHER ORDERED, ADJUDGED and DECREED That that certain Lease executed by the Defendant, O. A. NELSON, to the Defendant, CHARLES McMAHAN, being dated..... recorded on.....in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson, as Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska, be and the same hereby is declared null and void and is hereby set aside.

IT IS FURTHER DECREED That the title to the property and mining [68] claims hereinafter described be and the same hereby is forever quieted in the Plaintiffs, W. E. JAMES and AGNES JAMES, as against the Defendants, O. A. NELSON, N. P. NELSON, CHARLES HAWKINS and CHARLES McMAHAN, and each of them, to-wit:

Discovery on Bonanza Creek

No. 1 Above Discovery on Bonanza Creek

No. 5 " " " "

No. 6 " " " "

No. 14 " " " "

No. 15 " " " "

Discovery Fraction on Bonanza Creek

No. 5 Fraction Above Discovery on Bonanza
Creek

Discovery on Gold Run Creek

Discovery Annex on Gold Run Creek

No. 1 Cathenda Creek

No. 1 Little Eldorado Creek

No. 3 " " "

No. 1 Fraction on Little Eldorado Creek

Discovery Bench on Little Eldorado Creek

No. 1 Discovery Bench on Little Eldorado Creek

No. 2 " " " " "

No. 3 " " " " "

No. 1 Gold Bug Bench on Little Eldorado Creek

No. 2 " " " " "

No. 3 " " " " "

James Bench on Little Eldorado Creek

IT IS FURTHER DECREED That the Plaintiffs be and they hereby are awarded their costs and the sum of.....as Attorneys' fees in this proceeding; and that the Defendants be and they hereby are each denied their costs and attorneys' fees.

To all of which the Defendants except, and their exceptions are hereby allowed.

DONE in Open Court this.....day of February, 1935.

.....
Judge.

Presented by

LADY WILLIE FORBUS.

Copy Received this February 18th, 1935.

DONOHUE & DONOHUE,

Attorneys for Defendants.

To the refusal to enter the above the Plaintiffs except and an exception is hereby allowed plaintiffs. March 13 1935.

SIMON HELLENTHAL,
District Judge.

[Endorsed]: Filed Mar 13, 1935. [69]

[Title of Court and Cause.]

AFFIDAVIT.

L. V. RAY, being first duly sworn, on oath, deposes and says: That he is one of the attorneys for the plaintiffs in the above entitled cause and as such attorney participated in the hearing thereof; that upon this date a portion of the testimony given at said hearing has been transcribed by the official reporter as a basis for the filing of a Bill of Exceptions and that no opportunity has, however, been had to reduce the same to narrative form, but from an examination of such transcribed record, in the opinion of affiant, a question fairly arises upon said record as to whether or not the plaintiffs did acquiesce in the possession of N. P. Nelson of and to certain mining property, the title of which is found by the Court, in its Decree, to be vested in the plaintiffs. Affiant further says that the Petition for Re-Hearing on this cause is filed at the same Term of Court during which the cause was heard and within the period of three months after the date of the Decree made in said cause and

for further information in respect to the matters herein stated, affiant refers to the records of the above entitled Court in corroboration thereof.

L. V. RAY.

Subscribed and sworn to before me this 6th day of May, 1935.

[Notarial Seal] WARREN A. TAYLOR,
Notary Public in and for the Territory of Alaska.

My commission expires Aug. 11th 1935.

(This Affidavit attached to Petition for Rehearing in original files and filed same date, i.e., May 6, 1935.) [73]

[Title of Court and Cause.]

NOTICE.

THOS. M. DONOHOE, Esq.,

Attorney for the defendants above named:

You will please take notice that upon the coming in of Court at Cordova, Alaska, on the 7th day of May, 1935, at ten o'clock A. M., or as soon thereafter as counsel may be heard, the plaintiffs will seek an order of the above entitled Court permitting said plaintiffs to withdraw in said cause the Notice of Appeal heretofore served upon you and in said cause heretofore filed and to seek permission of and from the Honorable Simon Hellenthal, Judge of the above entitled Court, and who tried and heard the above entitled cause in equity, to file in said Court and in said cause a Petition for

Re-Hearing, a copy of such petition being herewith annexed and served upon you.

L. V. RAY,

of Attorneys for Plaintiffs.

Receipt of copy of Notice acknowledged this 6th day of May, 1935.

THOMAS M. DONOHUE,

Attorneys for Defendants.

[Endorsed]: Filed May 6 1935. [74]

[Title of Court and Cause.]

MINUTE ORDER SETTING FOR HEARING
ON ORDER RE PETITION FOR RE-
HEARING.

Now at this time on motion of L. V. Ray, Esq., of counsel for plaintiffs, the defendants not being present nor represented by counsel,

IT IS ORDERED that the time for hearing on order re petition for rehearing be, and it is hereby, set for the Special October, 1934 Term of Court at Cordova, Alaska, on September 9, 1935.

Entered Court Journal No. S-5, Page No. 198,
Aug 5 1935 [76]

[Title of Court and Cause.]

MINUTE ORDER RESETTNG FOR HEAR-
ING ON ORDER RE PETITION FOR RE-
HEARING.

Now at this time, on the Court's own motion, it is
ORDERED that the hearing on Order re Petition
for Rehearing be, and it is hereby, set for 10:00
o'clock A. M. of Wednesday, September 11, 1935.

Entered Court Journal No. C-4, Page No. 423,
Sep 9 1935. [77]

[Title of Court and Cause.]

HEARING ON ORDER RE PETITION FOR
REHEARING.

Now at this time this cause came on regularly
for hearing on order re petition for rehearing, the
plaintiff being represented by R. E. Baumgartner,
Esq., acting for L. V. Ray, Esq., attorney of rec-
ord, the defendant being represented by Thos. M.
Donohoe, Esq.

Whereupon, after argument by respective coun-
sel, the Court, being fully and duly advised in
the premises, took this matter under advisement and
ordered that hearing on order re petition for re-
hearing be, and it is hereby, continued until the
next term of this Court, namely October 14, 1935,
at Valdez, Alaska.

Entered Court Journal No. C-4, Page No. 435,
Sep 11 1935. [78]

[Title of Court and Cause.]

HEARING ON PETITION FOR RE-HEARING.

Now at this time this cause came regularly on for hearing on plaintiffs' petition for re-hearing heretofore and on the 9th day of May, 1935, filed in the above entitled cause, plaintiffs being represented by L. V. Ray, Esq., and the defendants by Thos. M. Donohoe, Esq.

Whereupon, the Court being fully and duly advised in the premises, directed the attorneys for both the plaintiffs and the defendants to draw up and submit a supplemental and final decree for his consideration.

Entered Court Journal No. 18, Page No. 57,
Oct 26 1935. [79]

[Title of Court and Cause.]

AFFIDAVIT OF NO OPINION.

United States of America,
Territory of Alaska—ss.

L. V. RAY, being duly sworn says:

That he is an attorney and counselor-at-law and one of the attorneys of record for the plaintiffs-appellants herein. That he was of trial counsel upon the hearing of this action. That no opinion was delivered or filed in said equity cause by the Judge presiding upon the hearing thereof.

L. V. RAY.

Subscribed and sworn to before me this 20th day of January, A. D. 1936.

[Notarial Seal] R. E. BAUMGARTNER,
Notary Public in and for the Territory of Alaska.
My Commission expires 17th September 1939.

[Endorsed]: Filed Jan 28 1936. [81]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

This cause came on for hearing in Equity, before the Hon. Simon Hellenthal, Judge of the entitled Court at a session of said Court, duly held at Cordova within the Division and Territory aforesaid, on February 14, 1935; the plaintiffs were present in person and represented by their attorneys of record; Lady Willie Forbus and L. V. Ray, and Thomas M. Donohoe, Esq. of the firm of DONOHOE & DONOHOE was present representing all the Defendants in said cause, the Defendants O. A. Nelson and N. P. Nelson being personally present.

Proceedings were then had in said cause as shown by the Statement of Evidence duly approved, settled and certified as correct and complete, as follows: [82]

[Title of Court and Cause.]

STATEMENT OF TESTIMONY.

IN ORDER to sustain the issues in the above entitled cause, the Plaintiffs called W. E. James as a witness in their behalf and said

W. E. JAMES

testified as follows:

I am the Plaintiff in this action. Prior to April 11, 1933, I owned the following mining claims:

Commencing on the lower end, the Discovery of Bonanza Creek; No. 1 Above Discovery on Bonanza Creek, Discovery Fraction on Bonanza Creek; No. 1 Chathenda Creek; No. 5 Above Discovery on Bonanza Creek; No. 5 Fraction Above Discovery on Bonanza Creek; No. 6 Above Discovery on Bonanza Creek; No. 1 Little Eldorado Creek; No. 1 Fraction on Little Eldorado Creek; No. 3 Little Eldorado Creek; No. 2 Little Eldorado Creek; Discovery Bench on Little Eldorado Creek; No. 1 Gold Bug Bench on Little Eldorado Creek; Gold Bug Bench No. 2 on Little Eldorado Creek; Gold Bug Bench No. 3 on Little Eldorado Creek; James Bench, right limit, on Little Eldorado Creek; 14 and 15 Above Discovery on Bonanza Creek; Discovery on Gold Run Creek; Discovery Annex on Gold Run Creek.

Prior to April 11, 1933, about February, 1933, I borrowed money from the First Bank of Cordova and the Cash Store at Chitina, about five thousand

(Testimony of W. E. James.)

one hundred odd dollars from the Bank and about twenty-eight hundred dollars [83] from the Chitina Cash Store. I gave the Bank a mortgage on all my property. I gave three notes to the Bank and one note to the Chitina Cash Store. O. A. Nelson, a Defendant in this action, was an owner with Johnny Nelson of the Chitina Cash Store. I was unable to pay the mortgage and so wrote the Bank and Mr. Nelson. The Bank sued me to foreclose the mortgage in 1932 or 1933. Afterwards, March 3, 1933, I got a letter from Thomas M. Donohoe, the attorney for the Bank.

(PLAINTIFF'S EXHIBIT 2

was offered and admitted in evidence, being a letter from Thomas M. Donohoe to W. E. James)

“March 3d 1933

“Mr. W. E. James

“Shushanna, Alaska

“Dear Mr. James:

“Mr. John S. M. Nelson of Chitina has been in Cordova and after talking the situation over with him and the officials of the Bank they have asked me to write you as the Chitina Cash Store and the Bank still hope that the matter might be straightened out, without entirely depriving you of all interest in the property.

“They have authorized me to state that if you will give a conveyance of the property such as a deed so that they may have control of its opera-

(Testimony of W. E. James.)

tion, and may make such arrangements as they desire to realize some part of the money they have coming, they will apply all amounts received upon your indebtedness until it is liquidated, and then return the property to you.

“I think myself that this would be a very fair method of handling the matter, and such preferable to foreclosing the mortgage from every one’s standpoint. [84]

“Please advise me promptly as to this, as I shall be compelled to proceed with the foreclosure suit if I do not hear from you in the very near future.

Yours very truly,

DONOHUE & DONOHUE.

By THOMAS M. DONOHE.”

I replied suggesting that the Bank see O. A. Nelson and that we could probably fix up a deal that would be satisfactory, as I wanted to get my bills all paid up. After that, about the 10th or 11th of April, 1933, O. A. Nelson came in. He said he came as Trustee from the First Bank of Cordova. He had a deed for me to sign, made out for one dollar. There was nothing in the deed about Mr. Donohoe’s proposition, nothing said about returning my notes or getting my ground back, or about the way it took my money out, nor the way it would be applied, or that I was to vacate, simply

(Testimony of W. E. James.)

to turn it over to them. Mr. Nelson said I would have to trust the Bank. I wouldn't sign. I said I would rather give you the ground. I will give you the ground if you will pay my bills and give me a clean slate. He said he would take the proposition to the Bank and submit it to them with the understanding that if the Bank turned the proposition down he would turn that deed back to me on the first mail, which would be in about thirty days. When my wife told him "you might keep that deed," he said "I would hate to think my word wasn't good enough that I wouldn't return that deed to you people." We signed it the next morning. It was given to the First Bank of Cordova. Nelson's name was mentioned on it as Trustee. We signed it in the presence of Mrs. Johnson. Harold Gillam signed it. He was in the next room when we signed it. It was not acknowledged. Mrs. Johnson was a Notary. Mr. Nelson was Commissioner. She didn't take my acknowledgment. [85] Nelson immediately left. I got a letter from him dated April 13.

(Testimony of W. E. James.)

(PLAINTIFFS' EXHIBIT No. 4

was offered and admitted in evidence, the same being a letter from O. A. Nelson to W. E. James and reading as follows:)

“Copy for you to keep

“April 13th, 1933

“Mr. W. E. James

“Chisana

“My dear James:

“I was busy yesterday getting a line on things and I talked with Donohoe over the phone. He said it suited the bank all right for you to have the piece of ground at the South of Eldorado. I will not have time to make a lease to it this morning, and I do not know if Gillam will stop here again before he goes directly to Chisana with your stuff. If I have time I will make the lease and send it in with Gillam on this trip, but if I do not I will send it in by the next mail and you can go ahead with your plans, knowing that it is coming in.

“The bank's first proposal was that they held the ground in trust till the debts were paid and then return the ground to you, but any unexpired leases that the Bank might give would hold until they expired. I understood that you preferred to give up all claim to the ground for all time with the understanding that you get the lease for a year on a plot of ground selected by yourself 100 by

(Testimony of W. E. James.)

100 feet, on Bonanza Creek at the mouth of Little Eldorado, and also that the Bank of Cordova and the Chitina Cash Store would accept the bill of sale for the ground as full and final satisfaction for the amounts you owe the two institutions.

“I do not want any possibility for a misunderstanding and if this is the way you intended the matter to stand, I wish you would write a note on the bottom of this page to that effect and sign [86] it. It will not be necessary for Mrs. James to sign this for it is simply for my information and whatever you say is what will hold.

“Please return this by Gillam this trip if you can.

“Very truly yours,

O. A. NELSON.”

The deed was not returned in the letter he wrote.

Q. I will ask you, Mr. James, if the lease mentioned in this letter was in accordance with your understanding and your agreement with Mr. Nelson at the time he went out?

A. Yes. I took it from that letter that the Bank had accepted the proposition. I was under that impression. O. A. Nelson said he was to return this deed, knowing everything would be all straightened up by the time that mail got back, and if it wasn't, he would send me back the deed. I thought the proposition must have went through; I took it

(Testimony of W. E. James.)

for granted the proposition must have went through, and Donohoe had passed on it favorable, but it didn't turn out that way.

I replied.

(PLAINTIFFS' EXHIBIT No. 5

was offered and admitted in evidence, the same being the reply of W. E. James to O. A. Nelson, and reading as follows:)

“Chisana, Alaska, April 16, 1933.

“Dear Mr. Nelson:

“In reply to the letter of the 13th, 1933. I prefer to the proposition of your cleaning up all of my indebtedness in First Bank of Cordova and Chitina Cash Store by deed for all time, returning me notes and receipts paid in full.

“I am to have the lease on the said mentioned ground to mine this summer or season, and to keep whatever gold I may recover from same; also the use of cabin on No. 6 Claim while mining same. I reserve my personal effects. Also giving a list of equipment that the deed covers, 1 sawmill, 35 h.p. boiler; 1 [87] steam engine, 18 h.p., 1 log building situated at mill site, 1 planer, 1 cabin situated in town Chisana, 1 cabin, log, situated on No. 1 Chathenda Creek, 1 frame cabin on 5, 1 frame cabin situated 6, 1 prospecting boiler on 1 above Discovery, 1 hydraulic plant.

W. E. JAMES.”

(Testimony of W. E. James.)

I heard nothing from Nelson from April 16, to June 30, 1933. Then I got a letter from him, and with it a lease covering the ground that I was to receive as a part of my original proposition to the bank.

(PLAINTIFFS' EXHIBIT No. 6

was offered and admitted in evidence, the same being a letter from O. A. Nelson to W. E. James, dated June 30, 1933, and reading as follows:)

“Department of Justice, Territory of Alaska.

June 30, 1933

“My dear James:

“* * * When I was down at Cordova about the first of May I took up the matter of your deed with Muller. I told him that you would prefer to make it an unconditional sale with nothing coming to you at any time in the future, and have the mortgage satisfied. But Muller does not want to drop the mortgage unless the C C S will take over the proposition and assume the debt owing to the bank. We would do this if we were in a condition where we could, but at the present the matter will have to stand just as we agreed when I was in there. N. P. Nelson has a lease on part of the ground, and the royalty from his lease and any other leases will go to pay off the mortgages. When these are paid, then the royalties will go to you. Probably you have as good an idea as I have how long that will be. If we find later that we can

(Testimony of W. E. James.)

afford to take up the indebtedness to the bank, then we will have the mortgage satisfied and you will be relieved of all responsibility for the indebtedness. [88]

“Very truly yours,

O. A. NELSON.”

On the same day the letter came, enclosing the lease from O. A. Nelson to myself, and before I had received it O. A. Nelson came to our cabin on No. 6 and said he wanted to borrow a lubricator. The other lubricator Mr. Nelson wanted to borrow, or asked for. I handed him that.

Q. What happened then?

A. He asked if I had any points. I told him I had some points, and there was some old ones needed to be fixed up a little bit there in front.

He had nothing more to say. I told him I thought there must be something wrong in this here deal I was getting into, I thought I was being double crossed. He did not reply. He walked right down on the Creek. I never saw him after that until yesterday. I did not reply to letter of June 30. I got no letters from him until October 12th, I wrote to the Bank when it looked like they were taking possession and going ahead around there—there was general talk around that Nelsons were going to operate this here property—and asked them why all this was going on, why this deed had not been

(Testimony of W. E. James.)

sent back to me. I kept no copy of my letter. I got a reply.

(PLAINTIFFS' EXHIBIT No. 8

was offered and admitted in evidence, the same being a letter from the First Bank of Cordova to W. E. James, and reading as follows:)

"September 15, 1933

"Mr. W. E. James, Chisana, Alaska

"Dear Mr. James:

"We are in receipt of your letter of September 10, asking why your notes have not been returned to you. We wish to advise you that under date of July 27, 1933, we forwarded your notes, totaling \$2801.50 to Mr. O. A. Nelson of Chitina. [89] As you know Mr. Nelson gave us his note in lieu of yours, and the mortgage which we held was assigned to him. Therefore you will have to look to Mr. Nelson for these notes.

"Yours very truly,

T. G. NESTOR,

Cashier."

This was the first notice I had that the notes and mortgage had been transferred to Mr. Nelson. I wrote Mr. Nelson between September 15 and October 12. I got a reply.

(Testimony of W. E. James.)

(PLAINTIFFS' EXHIBIT No. 9

was offered and admitted in evidence, the same being a letter from O. A. Nelson to W. E. James, and reading as follows:)

“Department of Justice, Territory of Alaska,

“Chitina, Alaska, October 12th, 1933

“Mr. W. E. James, Chisana, Alaska

“My dear James:

“On the 11th of April you made a deed and bill of sale for the mining claims and personal property. After naming the several mining claims the bill of sale reads: ‘and also together with a sawmill and cabin located near the postoffice in the town of Chisana, Alaska, and one large cabin located in the town of Chisana and known as the James Cabin; and also together with all houses, buildings, pipes, giants, flumes, tools, machinery and equipment of every kind and nature upon the said mentioned properties, or any of them, or in any manner connected therewith.’

“On the 20th of April I gave you a lease on a plot of ground at the mouth of Little Eldorado Creek which lease expired at the first of October, 1933.

“The deed and bill of sale was an outright and complete transfer of title, but at the time we considered both the propositions of returning the property to you, if and when the indebtedness had been paid, and of making the transfer permanent. I have

(Testimony of W. E. James.)

a signed statement from you in which you say that you prefer to make the sale permanent on condition that the mortgage be cancelled and the notes returned to you. [90]

“I now hold the mortgage and notes and they are a valid lien against any property you have until they are satisfied or returned to you and discharged.

“N. P. Nelson has possession of all of this property and you are hereby authorized to turn over to him all of the property named and described in the bill of sale. I am sending him a copy of this letter with instructions to receive this property and to check up thoroughly on the same, which he is in a position to do, as he knows what was on the ground at the time the mortgage was made.

“As soon as I receive word from N. P. that you have turned over all of the property covered by the deed and bill of sale, and have vacated the ground completely, and have met all of the terms of the above named deed and bill of sale, then I will send you the notes named therein and will send you the mortgage with the endorsement that it has been fully satisfied.

“Very truly yours,

O. A. NELSON.”

I know N. P. Nelson. He was in partnership with me from 1912 to 1914. There was no partnership when these transactions were entered into. I had had nothing to do with him for sometime prior.

(Testimony of W. E. James.)

Q. When did you first know about N. P. Nelson and any lease he claimed on this property?

A. As a laborer there. He said he was just a laborer there, working for O. A. Nelson. He never acknowledged to us of course—I never talked to him very much, but the first time he came in we had heard rumors——

Q. Well, don't tell anything about rumors.

A. Well, we were talking to him and he said "I am broke, you are broke." I said "I know I am broke." He said [91] there was some fellow coming in prospecting ground for O. A. Nelson.

Q. Did he come upon your ground?

A. I saw him up there later on. I have a cabin there on Five, a kind of community cabin, the only one around where people come up and stop, and stay as long as they want to. He asked me if he could stop in my cabin. I said "sure."

Q. Was he working on your ground during that period of time?

A. I never saw him right on the ground.

Q. Where was he working, if at all?

A. Well, later in the summer he was working up on the right of way for a flume.

Q. But that was not upon your property?

A. No.

Q. You had no notice or knowledge that he was there in any interest, or regard to this deed or lease at that time?

A. No.

(Testimony of W. E. James.)

Q. When you received this letter of October 12th, was this the first time you knew he had any possession of the ground?

A. Yes.

On October 18, I replied to O. A. Nelson's letter of October 12.

(PLAINTIFFS' EXHIBIT 10

was offered and admitted in evidence, the same being a copy of a letter written by W. E. James to O. A. Nelson, and reading as follows:)

"Chisana, Alaska, October 18, 1933

"Mr. O. A. Nelson: [92]

"Yours of 12th instant October 1933 to hand, contents noted. In reply must call attention to some of the facts that seem to have passed out of your memory.

"First we intrusted you to a deed made out by the First Bank of Cordova for considerable property, valued at by me at *the from* \$75,000 to \$150,000 to the First Bank of Cordova, Alaska.

"You honor bound yourself that you would present this deed to the Bank with our proposal, as you know was just this: If the Bank would cancel all my notes, mortgages, and to pay other creditors most of which you made note of. One was called in and at your request and you promised her, Mrs. Earl Hirst, that you would settle their account that I owe them, as you were representing the First Bank of Cordova.

(Testimony of W. E. James.)

“If the Bank would not accept this proposal you were to send the deed back to me return mail and the First Bank could go ahead with the foreclosure proceedings they had started.

“As to giving me a lease on a piece of ground to work this summer, could not be valid, as the First Bank of Cordova was a mortgager only.

“The deed was not valid as they evidently did not accept my proposal.

“The equipment on my property is intact all on the ground, and will stay there as long as I hold possession.

“I don’t care and it don’t interest me what N. P. Nelson knows or does not know. When I give up this property all the documents involved will have to be placed in uninterested parties’ hands while I make transfer.

W. E. JAMES.” [93]

About April 11, before so-called deed was signed, in the presence of Mrs. Earl Hirst, I gave O. A. Nelson a list of each of my creditors and the amounts I owed them, and he wrote it down in his notebook as I dictated it to him. Mrs. Hirst asked Nelson if the Bank was going to pay her bill. He said if the bank accepted the proposition, they would pay all the bills. In reply to my letter of October 18, I got a letter from O. A. Nelson. I turned it over to my lawyer, Mr. Ray. It is lost now. I re-

(Testimony of W. E. James.)

ceived it the first of November. It said I must vacate and turn over all the equipment and claims of property to N. P. Nelson. He says "I hold the mortgage, deed, notes; if you get any more property in the future, I will grab on to that." I went to Valdez and turned my case over to Mr. Ray. After I got back from Valdez, I was walking by N. P. Nelson's cabin. He said "O. A. Nelson has sent you in a package of papers, you better come in and get them." My wife opened them and I noticed these notes. I didn't take them. I said the deal hadn't been fulfilled and it was all off. I remained on the ground. I had possession of the ground. I have been a mining man about forty-four years, thirty-seven years in Alaska. I discovered this property. I managed, supervised and did the mining myself. My mining property included in this mortgage and deed is about \$150,000 at this time. If the Bank had accepted the trust, it was to run for five years. [94]

Upon Cross-Examination

by counsel for Defendant, this witness testified as follows:

I took out a little over two thousand dollars in 1932, but very little in 1931, around eight thousand in 1930, about three or four hundred dollars in 1931. The bed of the Creek which is in the claims included in this complaint is pretty well worked out. It was some time before the foreclosure since

(Testimony of W. E. James.)

I had made payments on the mortgage. Johnny Nelson had paid the interest for a year or two. I suggested O. A. Nelson as commissioner. I knew he had a personal interest in this. I wrote a letter to you March 9, 1933.

(DEFENDANTS' EXHIBIT A

was offered and admitted in evidence, the same being a letter from W. E. James to Thomas M. Donohoe, and reading as follows:)

“Chisana, Alaska, March 9, 1933

“Mr. Thomas M. Donohoe, Cordova, Alaska

“Dear Mr. Donohoe:

“Your letter of the third instant to hand.

“If you will send Mr. O. A. Nelson in here at an early date I am quite sure for my part that we can make a deal along the lines you mention in your letter, as I do not want to put anything in your way to delay paying them or the bank up.

“It is possible for them to take out that amount this summer, as I have practically all the dead work done. They will have to start their work by the first of April.

“Yours sincerely,

W. E. JAMES.”

(Testimony of W. E. James.)

Mr. DONOHOE: The letter reads as follows:

(Excerpt from Exhibit B)

“Chisana, Alaska, October 3d, 1932

“First Bank of Cordova, Cordova, Alaska

“Dear Mr. Muller: [95]

“We could not find the pay on the cut I stripped off this Spring. I am sure disappointed, as it was a favorable piece of ground. The pay must of cut into the bench, as it was good above and also below where we worked this year.

“After testing it out and could find no pay, I came up to Little Eldorado Creek and excavated for a dam on No. 3 Little Eldorado. And I am at this time driving a tunnel into the bench, with the intention of taking out a dump this winter.”

Q. Mr. James, this letter is dated on October 3d, the same season you testified you took out \$2,000.

A. It was 1931.

Q. Oh, it was 1931 you took out the \$2,000?

A. Well, I was a little confused, mixed up. In 1930 we went in; that is the year we didn't take out very much; next year we took out quite a lot; next year only about \$300.00.

(DEFENDANTS' EXHIBIT C

was offered and admitted in evidence, over the objection of Plaintiffs, exception to which was allowed,

(Testimony of W. E. James.)

the same being an instrument marked "Deed and Bill of Sale" and reading as follows:)

"Deed and Bill of Sale

"This indenture, made this 11th day of April 1933, between W. E. James and Agnes James, husband and wife, of Chisana, Alaska, the parties of the first part, and O. A. Nelson, Trustee, of Chitina, Alaska, the party of the second part, witnesseth:

"The said parties of the first part, for and in consideration of the sum of \$1.00 and other good and valuable consideration by them received, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, the following described property: [96]

"Placer mining claims, Discovery on Bonanza Creek, No. 1 above Discovery on Bonanza Creek, No. 5 above Discovery on Bonanza Creek, No. 6 above Discovery on Bonanza Creek, No. 14, above Discovery on Bonanza Creek, No. 15, above Discovery on Bonanza Creek, Discovery Fraction on Bonanza Creek, No. 5 Fraction above Discovery on Bonanza Creek, Discovery on Gold Run Creek; Discovery Annex on Gold Run Creek, No. 1 Chathenda Creek, No. 1 Little Eldorado Creek, No. 3, Little Eldorado Creek, Discovery Bench on Little Eldorado Creek, No. 1 Discovery Bench on Little Eldorado Creek, No. 2 Discovery Bench on Little Eldorado Creek, No. 3 Discovery Bench on Little

(Testimony of W. E. James.)

Eldorado Creek; No. 1 Fraction on Little Eldorado Creek; No. 1 Gold Bug Bench on Little Eldorado Creek; No. 2 Gold Bug Bench on Little Eldorado Creek; No. 3 Gold Bug Bench on Little Eldorado Creek; and James Bench on Little Eldorado Creek; all situated on Gold Run and Bonanza Creeks and tributaries, in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska; and also together with a saw-mill and cabin located near the postoffice in the town of Chisana, Alaska, and one large cabin located in the town of Chisana and known as the James Cabin; and also together with all houses, buildings, pipe, giants, flumes, tools, machinery and equipment of every kind and nature upon the said mentioned properties, or any of them, or in any manner connected therewith.

“To have and to hold the same, together with the dips, angles, spurs, ores, minerals, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever. [97]

“The said parties of the first part, their heirs, executors and administrators, do by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs, executors and administrators, all and singular, the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances,

(Testimony of W. E. James.)

unto the said party of the second part, his heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and forever defend.

“In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

“W. E. JAMES (typewritten) Seal.

AGNES JAMES and typewritten Seal.

Signed, sealed and delivered in the presence of
LUELLA JOHNSTON,
C. H. GILLAM.”

The signature is mine and Mrs. James, Mrs. Johnston and Mr. Gillam's. The first page don't read the same as the one I signed, I have read the complaint. I made the proposition to Mr. Nelson, not to Mr. Nelson himself, but for the First Bank of Cordova, that he should take the ground and keep it forever. The Chitina Cash Store was involved in it, they were the endorsers on my \$2800 note. My reply of April 16, Plaintiff's Exhibit 5, is an exact copy.

(DEFENDANTS' EXHIBIT D

was offered and admitted in evidence, the same being the original answer a copy of which was Plaintiff's Exhibit 5, and the pertinent part reading as follows:.) [98]

(Testimony of W. E. James.)

“Chisana, Alaska, April 16, 1933

“Dear Mr. Nelson:

“In reply to this letter of 13th, 33, I prefer to the proposition of yours cleaning up all of my indebtedness of the First Bank of Cordova and Cash Store by deed for all time, returning me notes and receipts paid in full . . .”

In the first letter, the 13th, I was under the impression the way he wrote that they had accepted; they kept me under that impression all the time up until October 12th. They were deceiving me all the time. The idea of writing these letters was to get me to commit myself, and get me off this main deal they were trying to get off. They agreed to pay off all the indebtedness. The Frank Mais bill was not included. It was paid by me.

Q. There was no other indebtedness, answered in this letter except the indebtedness of the First Bank of Cordova and the Chitina Cash Store?

A. No, I didn't go into it.

Q. You testified this morning Mr. James that Mr. Nelson made you a positive agreement that he would pay all your indebtedness.

A. If the Bank accepted this deal.

Q. Did you include in that the—did he promise to pay the claim of Mr. Arnolds against you?

A. No. That was an account we didn't put in, because I told him probably there were a couple we didn't have in mind at the time. And there was

(Testimony of W. E. James.)

a question about the Arnold account anyway, we didn't have a settlement.

Q. Arnold's account was a foreclosure of a lien on these [99] mining claims; he filed suit?

A. Yes, he filed a suit.

Q. You didn't include that claim?

A. No. It was questionable whether Arnold had anything coming.

The Kennicott Copper claim for hospitalization, I never guaranteed. I didn't mention that claim. There was no claim there. He agreed to pay off, not exceeding \$2500.00.

(DEFENDANTS' EXHIBIT E

was offered and admitted in evidence, the same being a letter from W. E. James to O. A. Nelson dated May 16, 1933, and reading as follows:)

"Chisana, Alaska, May 16, 1933

"Mr. O. A. Nelson, Chitina, Alaska

"Dear Mr. Nelson, I would like to have you send me a copy of the deed I made to the First Bank of Cordova,

Yours sincerely,

W. E. JAMES.

"P. S. Please send all notes to me as per understanding, receipt in full from First Bank of Cordova and Chitina Cash Store."

Signed "W. E. JAMES."

(Testimony of W. E. James.)

Mr. Nelson came in June 30th, and about June 30th signed lease and returned it to O. A. Nelson.

“Q. That came in approximately the same time as that letter you introduced in evidence this morning as Plaintiff’s Exhibit 6. That is correct is it?

A. Yes.

Q. You signed it and returned *to* to Mr. Nelson?

A. Yes.

He asked about sluice boxes. I told him these particular boxes didn’t go with the deal because they weren’t included in the ground. [100]

Q. You recognized at that time that this deal was still in force?

A. Well, I hadn’t gotten—I was in doubt about it because I told him, I said I was getting double crossed. So that is what I told them about them coming in and going to work on the ground, that he hadn’t fulfilled his agreement.

Not one word did he tell me that the Chitina Cash Store was making arrangements to take over these notes. I do not recall any conversation with Harry Boyden and Ira Mortridge. I did not make a statement substantially that the ground was worked out, the Bank and the Store were stuck, that I had a little gold dust, and wanted to pay some bills, particularly Joe Davis \$25.00, and that I was going to 40-mile by the way of Dawson, and that I had made a good deal. I did not joke about N. P. Nelson being stuck in his operations on the ground, and that they wouldn’t get anything for the sea-

(Testimony of W. E. James.)

son's work. I never talked to Harry Boyden about this case or N. P. Nelson's operations. I never told Joe Davis that in the deal with Nelson I had reserved a piece 100 by 100 for the summer, and that I could get enough to pay the bills around town, including his \$25.00, and that I was glad to get out of it as easy as I did.

Joe Davis didn't tell me he had been sent by N. P. Nelson to remove pipe lines from the creek. He helped me move my own pipe line. He happened along when I was doing it myself and said "I will give you a hand."

No. 2 Little Eldorado belongs to Joe Davis. Mine is Discovery Bench, Little Eldorado Creek.

(It is stipulated in Open Court that No. 2 Little Eldorado Creek should be stricken from the Plaintiffs' Complaint.)

I consider that Mr. Nelson violated this agreement on October [101] 12th. I was suspicious on June 30th. I gave O. A. Nelson nothing. He was in this as a trustee with my proposition to take up to the bank there. I didn't expect to get the ground back. if they paid off my bills, gave me a little ground to work. Then I was all through, but they didn't do that.

Q. All these claims, Mr. James, with the exception of this No. 2 which has been stricken, belong to you, and the title is in your name personally?

(Testimony of W. E. James.)

A. Yes, unless it would be 14 and 15. She staked some claims; I don't remember just which they were.

Q. That is 14 and 15 Above Discovery?

A. Yes, we staked some claims; I don't know whether we staked them jointly, but anyway they were all together in the family.

Q. Well, I wanted that perfectly clear so there is no misunderstanding that that was the only deal you entered into with Mr. Nelson. Now, Mr. James, on the 21st day of August, 1933, did you relocate claims No. 14 and 15 Above Discovery on Bonanza Creek under power of attorney under the name of Mrs. Sarah Galoski?

A. I think my wife made a location up there.

Q. Did you not yourself, *ask* attorney-in-fact for Mrs. Sara Galoski?

A. But the ground ran out there.

Q. These are two of the claims involved in this action?

A. They were staked as wild cats, and we never did any more work. [102]

Q. You did relocate those claims under date of August 21, 1933?

A. No.

Q. Do you recall, Mr. James, signing a location notice?

A. No I didn't.

Q. Mr. James, did you make a proposition to John Carroll that he should relocate some of the

(Testimony of W. E. James.)

other claims mentioned in this ground, and afterwards give you half interest?

A. No, not me. He asked me if that ground had run out. I said I thought it had. But my wife made some proposition with him that they would *to* up and stake the two wild cat claims, but myself, I didn't want to have anything to do with them. To the best of my knowledge the title was good as I had them.

Q. Mr. James, you didn't know that N. P. Nelson was working any of this ground until October of 1933?

A. Mr. Nelson never——

Q. Will you please answer my question? Did you know whether he was working or not?

A. He commenced work; the first I saw him doing on the ground was this spring.

Q. This Spring?

A. Yes.

Q. You mean 1934?

A. 1934.

Q. You didn't know whether during the season of 1933 he was doing any work on the ground?

A. I don't think he did any work. He said he was going up the Creek there; it might have been he was working up on Seven or Eight along there. [103]

Q. Did you turn any cabins over to him?

A. I loaned him a cabin on Five, relief cabin, where everybody comes in who wants to stop.

(Testimony of W. E. James.)

Q. Did you turn over any pipe or flume to him?

A. No.

Q. Any sluice boxes?

A. No. I turned nothing over to him; I battled with him.

Q. You didn't even know he was working that ground during the year of 1933?

A. I don't think he was working.

Q. Or that he had taken possession of any of the other property?

A. I had possession myself.

I didn't know Charles Hawkins had taken possession of any ground. I saw him down in the Spring this year; I heard the rumor around, but I didn't know he was working. By this year I mean 1934. I was not up and down the Creek in 1933 very much. It was rumored around that N. P. Nelson, Charles Hawkins and Charles McMahan were working this ground, but did not investigate myself. There was no one up there. I heard in the Spring that Hawkins was up on Discovery Claim. I waited there for a period; I never saw him working around there at all; I saw where there had been work done. I did not see him working.

Upon re-cross examination witness W. E. James testified:

Q. You haven't sufficient water in the stream to work the bench ground there now?

A. No.

Whereupon the Plaintiffs called

AGNES JAMES [104]

as a witness, testifying in her own behalf as one of the Plaintiffs as follows:

I am the wife of W. E. James. I was present on April 11 when Mr. Nelson came. He said he came as trustee for the Bank of Cordova. He made the proposition just as that letter you read. He said we will have to take the Bank's word. He said they would take over the proposition and work it to suit themselves. Mr. James turned it down. He said we would rather let the Bank have the whole thing if they would straighten up all his indebtedness to the two institutions and send him back his notes and have everything cleaned up, for he wanted a clean slate, that is the way he put it. Mr. Nelson asked what other bills we owed. We told him we owed Earl Hirst in Chisana and other bills, and he made a memorandum. He sent me over to Mrs. Hirsts to get her bill. She brought the bill over. She presented it and said "is the Bank going to pay the bills?" He said "if the proposition goes through the bank will pay your bills." He said "if the Bank don't accept the proposition it is to be returned on the next mail." We went to the post-office and signed. Gillam was in the other room when we signed and when Mrs. Johnson signed as witness. I looked at the deed. I read just the two lines at the top. It said "DEED" and about the second line it said Nelson was made trustee for

(Testimony of Agnes James.)

the First Bank of Cordova. I wasn't pleased with it, so I just signed the paper. The next I saw it was in Mr. Donohoe's office in Cordova. It was "DEED and BILL OF SALE" that he showed us. When we signed the deed, I said you could keep the deed and not send it back. He said "I would hate to think my word wasn't any good." [105]

Nelson came to Chisana about June. He said he came as Trustee for the Bank of Cordova. He asked about some boxes I told him they didn't belong on the ground, they were mine, and I sold them.

Upon Cross-Examination

by counsel for Defendant, this witness testified as follows:

I have read the complaint. Mr. Nelson and the First Bank of Cordova were not to hold the ground forever. If the proposition went through, they would have it forever, if they settled up our indebtedness, but if not they would send it back and go ahead with the foreclosure. There was no agreement to hold the ground in trust for five years. That was the proposition first discussed when he came in there; they wanted us to vacate, and the Bank work it to suit themselves, but they wouldn't say what percent would apply on our indebtedness. I signed the mortgage given the Bank in 1930. I was a witness to a location notice signed by my husband as attorney in fact for Mrs. Sarah Galoski, relo-

(Testimony of Agnes James.)

cating Claims Fourteen and Fifteen Above Discovery, which were included in deed and mortgage. Those claims had run out. We didnt know whether there was any gold ever found up there. When Mr. Nelson came on June 30, he stayed only a few minutes in the house; they were looking at a lubricator. Discovery Placer and Discovery Annex were claims covered within the mortgage. I made a deal with Mr. Carroll to re-locate them in his name, giving me half interest at a time when bank had started suit to foreclose mortgage. I don't know if they were in the deed. They had run out. The last assessment work recorded was for [106] 1930. The second page of the deed is correct. It is my signature. The first page is not the deed. I read the replies before filing. They are incorrect. I am positive that it is not the deed. I didn't have any conversation with Joe Davis about paying him \$25.00. Mr. James and I were taking the pipe line out of the Creek when he came down. He asked if he wanted help. I didn't say anything to Joe Davis, but he did mention \$25 down at the airplane landing last year. He said "what about the Simonds Estate bill of \$25." I said, "you couldn't expect us to pay, we turned that in for the Bank to pay." This is the only time Joe Davis asked us to pay. There was no conversation on September 28, 1933, in my presence by Joe Davis that N. P. Nelson had asked him to take the pipe line out of the creek, and that

(Testimony of Agnes James.)

Mr. James said it was all right and said he would help remove it. I did not state in the presence of Mr. James, Henry Boyden and Ira Morbridge that the Bank and Cash Store were stuck, that the ground was worked out and of no value, that we were going to leave and go to 40-Mile up by Dawson, that I had made a good deal by turning the ground over; that N. P. Nelson was stuck, and they wouldn't get anything out of the ground; that I had some bills I wanted to pay, especially to pay Joe Davis, before I left, from some gold dust I had recovered that season. I don't know Ira Morbridge by name, unless I'd see him. O. A. Nelson came to property about June 30th, said he was checking up on material, asked for sluice boxes, sledge, dynamo and lubricator. I told him sledge was forty miles away and it and dynamo had no connection with mortgage. Any property covered by the mortgage I was willing [107] to give to the First Bank of Cordova, not to Mr. O. A. Nelson, our dealings were with the Bank: if the Bank had cleared all our indebtedness we would have walked off, but they did not do it. Nelson went away with the lubricator. We included Frank Mais in the list of bills, but we paid him in the Fall of 1933. N. P. Nelson was not working on any of the ground in 1933. He flew in the early part of May, 1933, and came up the creek and started to work on Seven and Eight. There was no work done on the claims

(Testimony of Agnes James.)

there at all; but still there were notices on all the claims that the ground belonged to us, they tore the notices off the house and sawmill. Notices were posted in October 1933 and some after Mr. James got back from Valdez seeing Mr. Ray. N. P. Nelson had not been using the pipe line or flume during 1933. He was doing dead work to bring the water down, making a ditch to run the flume through to take water off to one of the benches. He started to work July 15, the same day he came up the creek. I didn't turn the cabins over to N. P. Nelson but in April, 1934, he broke into the cabin. I was downtown getting ready to go up to the Creek. He threw out all my personal things. What he didn't need he threw out. All summer they were in the rain and snow. I stayed out and slept on the ground while he took my cabin. I had not been living in this cabin since the Fall previous. We lived downtown in Chisana in the winter time. Our lease had expired when Nelson moved into the cabin. I never told N. P. Nelson to go in and break open the lock, but he was told by O. A. Nelson to break open the lock, Nelson said he told him. In 1933, we turned the James cabin over to Nelson. He put his stuff there. We were waiting to straighten up this business, thinking everything was going to be all right. [108] The deal wasn't closed yet when Nelson came in. We naturally let him have the cabin.

Q. Were any of the other cabins turned over to N. P. Nelson in 1933?

(Testimony of Agnes James.)

A. In 1933 there was—they had quite a lot of tonnage come in there; we were waiting to straighten up this business thinking everything was going to be all right. N. P. Nelson had no place to put his gasoline, and the James cabin was under mortgage, so he put his stuff there.

Q. You didn't object?

A. Well, the deal wasn't closed yet when Nelson came in; we naturally let him have it to put his stuff in; there was no other accommodation there for him to put his gasoline, and they had tons, barrels of it in cases.

No pipe lines, sluice boxes, no other cabins nothing was turned over to N. P. Nelson. In the Fall of 1933, I was not planning to go to the 40-Mile District. I have done all the pioneering and hardships I want without going into a country like that. I wasn't planning to leave Chisana until everything was straightened up, and they didn't straighten up, so I stayed.

Re-Cross Examination.

In the Fall of 1933 we paid Frank Mays bill.

Whereupon Plaintiffs called

MARGARET HIRST

as a witness in their behalf and said Margaret Hirst testified as follows:

(Testimony of Margaret Hirst.)

I am the wife of Earl Hirst. I know Mr. and Mrs. James and Mr. O. A. Nelson. Mrs. James came to our place in April, 1933 [109] for our bill against the James to turn over to O. A. Nelson for him to turn over to the Bank. I overlooked one. I took that over to Mrs. James to Mrs. James' cabin. Mr. and Mrs. W. E. James and O. A. Nelson were there. I told O. A. Nelson I had overlooked that one bill and I asked him if the Bank was assuming the bills against the James, and he said "yes." And I said "Will the Bank pay the bills" and he said "yes." The whole bill was close to a thousand dollars. It was a written bill, just the amount of the bill; I just handed it to him like this and he looked at it and folded it up and put it in a little note book, and put both in his pocket. I then went home. That is all I know.

Upon Cross Examination

by counsel for defendants, this witness testified as follows:

It was between nine and twelve o'clock when the conversation took place. They did not discuss the particular deal they were making. Mr. Nelson stated that the Bank would take care of those bills and we would get our money. Mr. Nelson and my husband were talking out in front while I was cooking dog feed. I did not hear them.

Whereupon Plaintiffs called

EARL HIRST

as a witness in their behalf and said Earl Hirst testified as follows:

I am the husband of Margaret Hirst. I had a conversation with O. A. Nelson about the James' indebtedness in front of our cabin. He was going by and I called him over. It was in April two years ago. All I asked him was what were they going to do about the bills they owed us. By "they" I mean [110] the Bank. I asked him if I could get my money. He said if the deal went through, the Bank would pay all outstanding bills and I would get mine. I have never been paid either from Mr. Nelson, or the Bank, or the James. Two years before that I had filed a freight claim with the Commissioner, but it was postponed.

Upon Cross-Examination

by counsel for defendants, this witness testified as follows:

Several years prior to this conversation I had filed a claim with Mr. Nelson as United States Commissioner. It was dropped. I did not refer to that when I talked with Mr. Nelson.

Q. Did he tell you if there was any way in which they could help you get the money, they would see it was done?

A. No, he didn't say that. He said if the deal went through the Bank would pay it, he would see to that.

Had no knowledge what particular deal was under discussion.

Whereupon, Plaintiffs called

O. A. NELSON

as a witness in their behalf, and said O. A. Nelson testified as follows:

I am United States Commissioner for the Chitina Recording Precinct, Territory of Alaska. A part of my duties is to record deeds, mortgages, and other instruments. I received a latter from Mr. L. V. Ray, Attorney for Mr. James, requesting me to furnish him a certified copy of a deed or some kind of paper, that the James had had recorded or that I had recorded. [111]

(PLAINTIFFS' EXHIBIT 11

was then offered in evidence, to which the Defendants objected upon the ground that the letter to Mr. Nelson from Mr. Ray is not pertinent and not competent to the testimony herein. Whereupon the Plaintiffs in support of the introduction of said evidence stated that the purpose of the testimony was to show that the complaint was based upon a certified copy and not the original instrument. The objection was sustained, and exception taken and allowed.)

I wrote a letter in reply to Mr. Ray's letter to me.

(Whereupon

PLAINTIFFS' EXHIBIT 12

was then offered in evidence, being a letter from Mr. Nelson to Mr. Ray in reply thereto, to which

(Testimony of O. A. Nelson.)

the Defendants objected upon the ground of incompetency and not within the issue in this case. Whereupon the Plaintiffs supported their offer by the same argument as for Exhibit 11. The objection was sustained, and exception taken and allowed.)

Thereupon, the Plaintiffs closed their case.

Thereupon, the Defendants to sustain the issues on its part called as a witness

O. A. NELSON

one of the Defendants in the action, who testified as follows:

I reside at Chitina. I run a general mercantile business. Chitina Cash Store, drug store. John S. Nelson was my partner, now deceased. The James were indebted to the Cash Store, part a bill they owed the store, and the Chitina Cash Store was the indorser on a note for twenty-eight hundred and fifty dollars. I was in Chisana April 11, 1933, and had a conversation with W. E. James and Mrs. James on that day. I went in there at the suggestion of the Bank, to make an arrangement with the James, as they suggested, to take over their property in payment of this indebtedness. We talked about two hours. We first talked of the idea of the property was to be deeded to me; I was to hold it in trust, and the Cash Store and the Bank together would [112] hold the ground and work it with the idea of recovering what they could from

(Testimony of O. A. Nelson.)

the ground on this indebtedness. Mr. James said he would much prefer to make an outright deed to the property in lieu of the indebtedness to the Bank and the Chitina Cash Store. That what he wanted was to get that mortgage disposed of. There was talk of the idea of my holding it in trust after the indebtedness to the Bank and Store had been paid off, if I was to continue holding it for the purpose of paying up this further indebtedness; they owed several people around the country. The final understanding was, they said they wanted to call this deed an outright and final settlement, and the only consideration they wanted was that I give them a lease on a certain piece of ground on Bonanza Creek. The deed was to settle up the notes they had given to the Cash Store and the Bank. I did not promise to pay other creditors. I had no authority to enter into such an agreement from the Bank, and I did not do so for myself either. They were to have a lease on a piece of ground at the mouth of Little Eldorado Creek till the first of October. James said he could make a little money on this ground, that he wanted to get enough money together and go to 40-Mile. I made no agreement with James as to when the papers were to be sent to him. I told him I would return and take the matter up with the Chitina Cash Store and see if it was satisfactory to them; if it was, I would on the returning mail either send the lease or cancel the deed. I saw the Deed and Bill of Sale signed.

(Testimony of O. A. Nelson.)

It is exactly the same as signed. No changes have been made in this instrument since its signature. When I returned to Chitina, I made a lease to Mr. James and sent it to him. To avoid a possible misunderstanding as to what the [113] final agreement was, I wrote that letter (Plaintiffs' Exhibit No. 4, Defendants' Exhibit D) to Mr. James to request that he write me if that was the way he wanted the matter to stand. I saw the James on June 30th. I went down primarily to ask them about some property named in the deed. I asked them what right they had to dispose of sluice or flume boxes that had been put on the property and taken away by one Jack Carroll. Mrs. James assured me that those boxes were not my property, that the boxes had been brought on the ground after I bought it, and she had a perfect right to dispose of them. I asked about the lubricator and some sleds. James said the sleds were down at the cabin at Chitina and were his personal property. He enumerated certain property belong to me by reason of the deed, and at that time he protested—as he put it—in being doublecrossed, in that I hadn't sent the notes. I told him I would send them as soon as I had gotten them from the Bank. He didn't tell me the deal was off; the only thing he said at all was his protest that we had not sent those notes in to him. We paid the bank the amount of the secured notes about a week later.

(Testimony of O. A. Nelson.)

(Defendants' Exhibit F

was offered and admitted, the same being notes held by the Chitina Cash Store and the First Bank of Cordova; whereupon it was stipulated between the parties that the same may be considered as read.)

These are the promissory notes I received from the Bank of Cordova. I paid the Bank for these eight—one hundred and twenty-two dollars and some cents. There was about \$530 open account of the store, and \$1945 was a note they owed the store.

(Defendants' Exhibit G

was offered and admitted, the same being a note held by the Chitina Cash Store signed by W. E. James; whereupon it was stipulated between the parties that the same may be considered as read.)

[114]

The \$2860 note was included in the notes and mortgage. There was \$14.00 interest due on these notes. I think that is all the items. I gave three leases to a portion of the ground covered by the Deed, one to N. P. Nelson covering little Eldorado for ten years from the time the lease was made about two years ago; I gave a lease to Charlie Hawkins on No. 1 Chathenda, Discovery Fraction on Bonanza; and I gave a lease to Harry Sutherland for a couple of claims over on Cache Creek—on Gold Run Creek I should have said. He was a partner with Hawkins; his interest was embraced by the lease to Hawkins.

(Testimony of O. A. Nelson.)

(DEFENDANTS' EXHIBIT H

was offered and admitted, the same being a lease from O. A. Nelson to N. P. Nelson covering Little Eldorado; whereupon it was stipulated that the same be considered as read.) (The lease is in words and figures as follows:)

LEASE

THIS AGREEMENT, made and entered into this 17th day of April, 1933, by and between O. A. Nelson, first party and N. P. Nelson, second party; WITNESSETH:

That the first party for and in consideration of the sum of One (\$1.00) Dollar and other good and valuable considerations to him in hand paid by the second party, the receipt whereof is hereby acknowledged and of the rents, conditions and covenants to be paid and performed by the second party as hereinafter set forth does hereby lease and remiss to the second party, upon the terms hereinafter expressed, the following described placer mining ground situated in the White River Mining District, Territory of Alaska, and more particularly described as follows, to wit:

All of the bench ground lying opposite No. One on Little Eldorado Creek and extending up to No. 8 on Bonanza Creek. [115]

No. Five Above Discovery on Bonanza Creek, 1320 x 660 feet, more or less.

(Testimony of O. A. Nelson.)

No. Five Fraction Above Discovery on Bonanza Creek 78 x 660 feet, more or less.

No. Six Above Discovery on Bonanza Creek 1320 x 660 feet more or less.

No. One on Little Eldorado Creek, 1320 x 660 feet, more or less.

No. One Fraction on Little Eldorado Creek 81 x 660 feet, more or less,

No. One Discovery Bench on Little Eldorado Creek 1320 x 660 feet, more or less,

No. Two Discovery Bench on Little Eldorado Creek 1320 x 660 feet more or less,

No. Three Discovery Bench on Little Eldorado Creek 1320 x 660 feet more or less,

for a term to expire on the first day of October, 1942, nineteen hundred forty-two, unless sooner terminated by a failure to do and perform the terms, covenants and conditions of this agreement; and the second party agrees that he will enter into possession of said hereinbefore described properties and will during the said period work, mine and prospect parts and portions thereof, and said mining operations shall be carried on by him in a workman and minerlike fashion, and in a manner having in view the preservation of said claims as workable mines; and that from the gold extracted from said property he will pay to the said first party as royalty ten (10%) per cent of the gross amount of gold [116]

(Testimony of O. A. Nelson.)

—Provided also that the said lessee N. P. Nelson shall have the use of the pipe, tools and equipment now on Bonanza Creek and formerly in the possession and belonging to W. E. James, and also the use of the saw mill located at Chisana insofar as the said saw mill may be owned by, in the possession of, or controlled by the said lessor,—mined and extracted by him from said claims, which said royalty shall be paid to the first party immediately after each cleanup; that the first party hereby reserves the right to be present at each and every cleanup, either in person or by a representative, and also the right to pan the ground for the purpose of determining the values of gold contained in said ground.

The second party agrees that he will not allow any valid lien or encumbrance to be created against said property for work or labor done in mining or development of said property, or for good, wares, or material used in mining or development of the same; That the second party shall not sublet, without the consent of the first party in writing, any part or portion of the property hereinbefore described.

And it is further hereby expressly understood and agreed that in the event that the second party shall fail to comply with and perform all of the covenants, and agreements expressed herein, which said party has agreed to perform, or shall fail to

(Testimony of O. A. Nelson.)

pay unto the first party the royalties herein as said royalties shall become due and payable according to the terms of this lease, then and in that event the said second party shall forfeit all rights under [117] this lease and will peaceably surrender the possession of said property unto the first party.

IN WITNESS WHEREOF the said parties hereto *have*

O. A. NELSON

First Party

N. P. NELSON

Second Party

Signed, sealed and delivered in the presence of
M. N. CHASE

This is the lease I gave to N. P. Nelson.

(Defendants' Exhibit I
was offered and admitted, the same being a lease from O. N. Nelson to Charlie Hawkins covering No. 1 Chathenda, whereupon it was stipulated that the same be considered as read.)

This is the lease I gave Charlie Hawkins for the ground.

(Defendants' Exhibit J
was offered and admitted, the same being a lease from O. A. Nelson to Charlie Hawkins covering Discovery Fraction on Bonanza; whereupon it was stipulated that the same be considered as read.)

This is the lease I gave Charlie Hawkins on Discovery Fraction of Bonanza Creek.

(Testimony of O. A. Nelson.)

(Defendants' Exhibit K

was offered and admitted in evidence, the same being a lease from O. A. Nelson to Harry Sutherland covering Gold Run; whereupon it was stipulated that the same may be considered as read.)

This is the lease I gave Harry Sutherland for claims on Gold Run.

I did personally not take possession on April 11, 1933. After N. P. Nelson received the lease, he went in there. The only property given me personally under the Deed and Bill of Sale was the lubricator; they gave me that when I was in there in July. The James and I had no particular dealings with regard to the [118] property after that date. I had a conversation with the Hirsts on the morning of April 11, 1933. In front of their cabin, I talked mostly with Mrs. Hirst. She told me the James owed them considerable money and she asked me if we were taking over this James property. I told her we were considering it, but I didn't know whether the deal would go through or not. She asked me what possibility there was in collecting their bill. I told her I didn't know, it all depended on what arrangement went through, I told her I would be glad to help her in any way I could, but didn't know what could be done. [119]

(Testimony of O. A. Nelson.)

Upon Cross-Examination:

By counsel for plaintiffs, this witness testified as follows:

Mrs. Hirst asked me as to the possibility of the payment of that bill. I told her I didn't know whether I could do anything or not. I don't recall whether I told her I was acting for the Bank. I told her I would help her if I could. I did not tell her if the Bank accepted the proposition I would pay the bill. She did not hand me this bill. I do not remember her walking into the cabin. She may have. It is highly probable. I do not recall taking a bill from her written on a piece of paper. I do not recall putting it in any note book. I would not want to say Mrs. Hirst was lying. She might be mistaken. I have no opinion in the matter. I wrote a letter to Mr. Ray with reference to my conversation with Mrs. Hirst. I had a conversation with Mr. and Mrs. Hirst at the same time in front of the cabin. I don't remember whether I spoke of the Bank. I don't think he asked me if the Bank was going to pay the indebtedness. He asked me what was said about the deal; he asked me if he would be able to collect what he had coming. I told him it would depend on whether the deal went through. I told him I would do anything I could. I did not say the same thing to Mrs. Hirst in the cabin. I may have had a note book out in the cabin. I can't recall. I usually carry a note book around with me. It is quite possible I had a note book out that day when talking to Mr. and Mrs. James

(Testimony of O. A. Nelson.)

about the transaction. I do not remember putting anything down in the note book. I did not write the proposition down. I went out there in the interests of the Bank of Cordova and the Chitina Cash Store combined. It was agreed by the Bank and the Chitina Cash Store that I was to go out there. Mr. Donohoe represented the Bank and us in that matter, and since that time has represented us. I did not go in there as a Commissioner representing all the parties in this action. I went in as an individual. I wasn't acting in any official capacity. I went to see the James' shortly after I arrived on April 10th, and told them I had come in as requested to make arrangements to settle up their indebtedness. I don't remember telling them I came as trustee for the Bank. [120] The word "trustee" was put into the deed—put into the instrument I took in there by Mr. Donohoe with the idea that when I went in there I would probably take this ground over and hold it on the trust agreement proposed by the Bank. It was Mr. Donohoe that first gave me the idea that there was going to be some trust agreement. Our final agreement was that as far as I was concerned, I would take over the property in final settlement of the mortgage, but I also told them that I would have to take it out and get the approval of the Bank and my partner there as to that arrangement because that arrangement had not been definitely agreed upon. The agreement was not final until it was approved

(Testimony of O. A. Nelson.)

by the Chitina Cash Store and the Bank, but this tentative agreement was that the ground was to be turned over as final settlement for debts owing by the James' to the Chitina Cash Store and to the Bank; also part of the agreement specified I was to give them a lease on a plot of ground on Bonanza Creek 100 by 100 square feet at the mouth of Little Eldorado Creek. There was nothing said about thirty days. I said I would send it back immediately or lease the ground. I said I would send one or the other at the first opportunity. I did not let them know in my letter of April 13th. I wrote the letter of April 13th to get them to confirm my idea of what the proposition was. I knew as far as I was concerned, and I wanted to make sure they understood it just the way I understood it. Their statement written on the bottom of the letter seemed to confirm my statement. The deed was recorded on April 15th.

Q. You got this letter back from the James' in reply to yours—this letter of April 16th—approximately what time, do you recall?

A. I wrote them on the 13th; it is possible the plane went in there and back the next day; I don't remember the exact date.

Q. Did you have any conference about this deed before you put it on record?

A. When I came back from Chisana on the 11th, the date of that deed—I returned on the 11th—either that day or the next morning I called

(Testimony of O. A. Nelson.)

up Mr. Donohoe and told him what the arrangement was I had made and asked him to take it up with Muller and see if they approved [121] it. He said they did.

Q. That would mean on the 12th that he told you that at that time it was all right, was accepted?

A. Yes.

Q. You wrote the James' on the 13th, and they replied to it on the 16th, to find out if this was what they wanted?

A. I don't remember the date.

Q. Well, you show the deed here dated the 16th.

A. Yes.

Q. You don't know when it was received, but you had already accepted the deed in the meantime, and had already recorded it.

A. Yes.

I assume that I sent the James' a copy of the deed. I don't remember that I did. I can say that I did even though I don't remember having done it. It is altogether possible I did. I put N. P. Nelson in possession of the property at the time I made out the lease to him on April 17th.

Q. You had not received this letter of the 16th at that time?

A. When I made that lease I had received James' letter of the 16th of April. I received that at the time the lease was made.

Q. But you just testified the lease was already made then.

(Testimony of O. A. Nelson.)

A. At the time I received the letter, yes.

Q. What is the fact, then?

A. I made the lease out after I received this letter from the James', confirming my opinion of what the agreement was.

Q. So the letter was written to you on the 16th; you received it and you made out the lease on the 17th, and that all took place in that short time? Do you want the Court to understand that?

A. I do. I didn't make that lease out until after I got the letter back because N. P. Nelson wouldn't accept the lease until he knew the ground was in the clear.

On June 23, 1933, I filed a certificate of exemption, known as a notice to hold, with reference to the property involved in this controversy. I signed it individually. It was not signed by me as [122] trustee for the First Bank of Cordova nor as trustee for the Chitina Cash Store.

Q. Now Mr. Nelson, I ask you this question—did you ever write a letter, or have any conversation with Mr. James or Mrs. James that the original proposition to pay the creditors, along with the First Bank of Cordova and the Chitina Cash Store, was or would not be accepted?

A. That letter of April 13th was intended to convey to him the idea that we accepted their proposal to take the property over.

Q. But I am asking you now, if you ever gave them any notice as to what the Bank's action, or

(Testimony of O. A. Nelson.)

your action would be as to whether or not the creditors would be paid, along with the Bank and the Chitina Cash Store?

A. I don't remember ever writing them any letter.

On Re-Direct Examination,

by counsel for defendant, this witness testified as follows:

I never made an agreement that the creditors would be paid, and of course, didn't notify James' that they would be paid. [123]

WHEREUPON, the Defendants, under Rule 38 offered

THOMAS DONOHOE

as a witness in their behalf, and said Thomas Donohoe testified as follows:

I am an attorney residing in Cordova. During all the negotiations with the James' and the First Bank of Cordova, both in the foreclosure and in this particular deal, I represented the First Bank of Cordova. During this transaction I was not representing the Chitina Cash Store or O. A. Nelson, except incidentally as their affairs might affect the affairs of the First Bank of Cordova. Previous to the foreclosure I told the James' if they would make reasonable efforts to take care of the bills we would try to hold open the foreclosure. I was

(Testimony of Thomas Donohoe.)

instructed by the Bank and the Store to write Mr. James and make an offer to them that if he would put the property in the hands of either the Store or the Bank we would hold it until their indebtedness was paid, and apply all proceeds upon the payment of those two bills. That led up to my writing that letter dated March 3, 1933, introduced as Plaintiffs' Exhibit E. I then prepared the deed and bill of sale, I wrote it myself on the typewriter, the entire instrument. The instrument as returned is in the same condition as it was when I sent it to Mr. Nelson, with the exception of the date inserted and the signatures. It was clipped together by me and returned the same way. Mr. Nelson called me on the phone and submitted to me, on behalf of the Bank, the proposition that the Chitina Cash Store and the First Bank of Cordova turn over to the James' the cancelled notes receipts in full, and a lease to a certain portion, 100 by [124] 100 feet square on the ground. The Bank accepted the proposition and Mr. Nelson came to Cordova, but the Bank would not turn the notes over without something to show; and Nelson was obliged to take up these notes. The Bank accepted the notes of the Chitina Cash Store, and turned the James notes over to Mr. Nelson.

WHEREUPON, Defendants called

N. P. NELSON

as a witness in their behalf and said N. P. Nelson testified as follows:

I have resided at Chisina since April, 1933; previously I resided there from about 1913 to 1916. I am a miner, O. A. Nelson gave me a lease dated April 17, 1933, covering certain property, after which I started prospecting on No. 5 Above Discovery on Bonanza Creek—no, No. 1 on Little Eldorado. I did a lot of dead work in making a right of way for a flume. I saw the James' almost every day while working on No. 5 or No. 1 Little Eldorado. They didn't make any objection to my working this ground. Since prospecting in 1933, I worked the ground the summer of 1934. I occupied Cabin No. 5 and No. 6. I had a conversation with James. He said he had turned over to me one cabin, one at the mouth of Bonanza; he also asked me if they could keep their personal belongings till such time as they could remove them, which I allowed them to do. I have held this property ever since I went there in April and have been mining it ever since. We expended for supplies, merchandise, and so forth \$7,899; freight bill \$2,000, the freight bill on this merchandise, \$2897; I paid out for labor \$5,660. The total is \$16,540. I recovered [125] \$9,000 gold. It is pretty hard to state without prospecting the ground the values the ground contains. The creek has all been worked. I worked on the lower end of No. 6, Bench. I took the water out of No. 9, Bonanza. I got the water right from Don Green.

(Testimony of N. P. Nelson.)

Upon Cross-Examination
this witness testified as follows:

I did not break the lock off the cabin door in which Mrs. James had her home; I pulled the chain, the fastening chain that pulls the lock, and went in. Some of Mrs. James personal effects were there. I put them outside and covered them up. I don't know how many yards of gravel I handled during the season of 1934. We worked probably about 80 feet above the Creek bench. The gravel averages about 8 feet deep. I had six men working; I used hydraulic method, using No. 2 giant, about 60 feet head. I pulled the water from No. 9 Bonanza about a mile by flume 29 inches wide and 18 inches long. The hydraulic pipe leading from the flume was all the way from 14 to 9 inches. I piped about 40 days, and recovered \$9000 at the present price of gold. The strip I worked out on No. 6 was about 14 feet long and about 6 feet wide and 8 to 10 feet deep. I don't know, I never measured it, but I would guess it would run probably about \$5.00 a yard. I don't know how many claims in James' holdings. Bonanza Creek is about five or six miles long, a steep creek, lot of gravel left up in the benches in some places; Little Eldorado is about two miles long; Gold Run is about two miles long. I was in there in the early days. The beds of the creeks have been pretty well worked out, bench mining is left. There had been no bench

(Testimony of N. P. Nelson.)

mining on No. 6 before [126] I worked it. I worked a strip about 100 by 80 feet, 8 to 10 feet deep, and got \$9,000 in 40 days.

On Re-Direct Examination

by counsel for Defendants, this witness testified as follows:

I entered the cabin the latter part of March, 1934. I took out an old burned down stove and heater, a wash board and an old quilt. The bench ground on various streams at Chisana have been prospected. I don't know the values recovered in prospecting.

On Re-Cross Examination

by counsel for Plaintiffs, this witness testified as follows:

No one was associated with me in this lease. I didn't have the necessary money to pay for the merchandise and freight. O. A. Nelson is interested with me.

WHEREUPON, Defendants called

HENRY BOYDEN

as a witness in their behalf and said Henry Boyden testified as follows:

I am a packer and freighter and guide with big game parties. I have no financial interest in this case or any ground at Chisana. I have known the

(Testimony of Henry Boyden.)

James' since 1913. I am familiar with the country around Chisana. I had a conversation with the James' at Frank Mais' cabin at the mouth of Bonanza Creek between the 14th and 16th of July 1933. Mr. and Mrs. James said they had a deal with the Chitina Cash Store and the Bank and they were taking over the ground. Mrs. James said they were very well satisfied with the deal, Mr. James said the same thing; they said they were leaving the country to go to 40-Mile by way of Dawson, and she had some gold dust and she said she wished to pay [127] some bills, one particularly to Joe Davis. Mr. James said the ground was worthless, it had been worked out, people hanging around there were foolish and starving to death, and the longer they stayed the worse state they would be in. They said N. P. Nelson wouldn't be paid for his time working the ground, that the ground was worked out.

Upon Cross-Examination

by counsel for Plaintiffs, this witness testified:

I do not pack for O. A. Nelson, I pack for Joe Davis, who owns a claim right next to the James' claim.

WHEREUPON, the Defendants called

BURT J. DAVIS

as a witness in their behalf, and said Burt J. Davis testified as follows:

I reside at Chisana, Alaska. I am a placer miner. I have no interest in this case. I had a conversation with the James in front of the cabin No. 6, Bonanza last of April 1933. I asked them "how about my bill?" They said, "we want to pay you and Frank Mais and some other little bills we owe around town." I had a conversation with them September 28, 1933, at James Cabin on No. 6. I told them I came down and was sent by N. P. Nelson to set the pipe line up safe where there is no ice. He said, "All right, I'll give you a hand." Mrs. James said "I am going to get back that deed." I said "you will have a hell of a time." N. P. Nelson took possession about April 11, 1933. He was prospecting on No. 5 and the lower end of No. 6 on Bonanza. Since then, he worked there last summer. [128]

Q. Do you know if Mr. Hawkins and Mr. McMahon have some ground in there?

A. They have been trying it; they didn't get nothing. Charlie Hawkins came up and worked for me the balance of the summer.

I am familiar with the ground embraced on Little Eldorado and other creeks around there. I have lived in Chisana since April 1915. I own some claims there on Little Eldorado. Mrs. James said

(Testimony of Burt J. Davis.)

she would pay me. The James' haven't paid me my bill of \$25.00 yet. It was an account due on the Simonds estate, for which I was acting as agent.

Upon Cross-Examination

by counsel for Plaintiffs, this witness testified as follows:

I had a conversation with Mrs. James out at the airplane landing in the Fall of 1933. Mrs. James did not tell me I would have to look to the Bank, when I asked her when she was going to pay that Simonds bill. She said "Bill is leaving for Valdez." She told me she was going to see a lawyer, that the Bank was supposed to pay the bill; that is the only conversation I ever had with her.

THEREUPON, the Defendants closed their case.

The foregoing was all the evidence introduced on the trial of said cause. Whereupon counsel for the respective parties presented their closing arguments to the Judge. [129]

[Title of Court and Cause.]

STIPULATION AS TO STATEMENT OF EVIDENCE.

It appearing that Plaintiffs-Appellants lodged with the Clerk of the above entitled Court on November 23rd, 1935, a condensed statement of evi-

dence pursuant to Equity Rule No. 75 (b), and that the Attorney for the Defendants-Appellees was given due notice thereof, made objection thereto; whereupon, said condensed statement of the evidence has been re-drafted and prepared by counsel; now on the 29th day of January, 1936, it is stipulated and agreed by counsel for all the parties to this action that said re-written condensed statement may be settled without further notice and approved, and do hereby waive notice, and consent to the immediate hearing on said statement.

L. V. RAY

Of Attorneys for
Plaintiffs-Appellants.

THOMAS M. DONOHUE

Attorney for
Defendants-Appellees.

[Endorsed]: Filed Jan. 28, 1936. [130]

[Title of Court and Cause.]

ORDER APPROVING CONDENSED STATE-
MENT OF EVIDENCE.

It appearing that the within and foregoing condensed statement of the evidence was lodged in the office of the Clerk of the Court by the Plaintiffs-Appellants, in this cause, for the examination of the other parties, in said cause, on the 23rd day of November, 1935, being in due time, and that notice

of such lodgment, and of the intention of the Plaintiffs-Appellants, at this time and place to ask the undersigned, the Judge of this Court, to approve said condensed statement of evidence, having been given the attorney for said Defendants-Appellees, more than ten days prior to this time, and it appearing that subsequently said condensed statement of the evidence has been re-drafted and prepared by counsel, as now submitted to the Judge of this Court, on the 29th day of January, 1936, in due time; and it appearing that counsel have stipulated that such Statement of Evidence may be settled and approved, without further notice; and it further appearing that the foregoing narrative of the evidence contains all of the evidence and all of the exhibits stated in simple and condensed form that were introduced, heard or considered by the Court in render- [131] ing its decree in the above cause, and that as to such portion of the foregoing narrative as is set forth in the form of questions and answers such form is necessary to accurately reflect what occurred; now therefore, it is,

ORDERED, that the foregoing statement and narrative of the evidence be, and the same is hereby, settled, allowed and approved as a full, true and correct statement in simple and condensed form, of all the evidence introduced in connection with all the proceedings and motions in the above cause and contains all the evidence material to the hearing of the appeal in said cause and the matters

stated in full in the form of questions and answers are directed to be so set forth.

WITNESS the hand and seal of this Court this 29th day of January, 1936.

SIMON HELLENTHAL

District Judge.

Entered Court Journal No. C-4. Page No. 453,
Jan. 28, 1936.

[Endorsed]: Filed Jan. 28, 1936. [132]

I.

That thereafter and before Decree was rendered in said cause the Plaintiffs did submit to the Court this proposed Findings *and* Fact and Conclusions of Law, which the Court refused to give or adopt and to such refusal did allow Plaintiffs an exception thereto, said proposed Findings of Fact and Conclusions of Law are as follows:

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

BE IT REMEMBERED that on the 14th day of February, 1935, the above entitled cause came on regularly for hearing before the HON. SIMON HELLENTHAL, Judge of the District Court for the Territory of Alaska, Third Division, sitting as

a Court in Equity at Cordova, Alaska, Third Division, upon the Complaint of Plaintiffs as amended, and the Cross-Complaint and Affirmative Defense of the Defendants appearing separately, and the Reply of Plaintiffs thereto, the Plaintiffs appearing in person and through their attorneys of record, L. V. RAY and LADY WILLIE FORBUS, and the [133] Defendants O. A. Nelson and N. P. Nelson appearing in person and through their attorneys of record, DONOHUE & DONOHUE, the Defendants, CHARLES HAWKINS and CHARLES McMAHAN, not appearing; whereupon the Court proceeded with the hearing; and the Plaintiffs having introduced testimony in their behalf said cause was continued to February 15, 1935; whereupon the Plaintiffs introduced further testimony in their behalf and rested; thereupon the defendants, O. A. NELSON and N. P. NELSON, introduced testimony in their behalf and rested; and the Court having read and considered the pleadings and exhibits therein, and having heard the argument of respective counsel, and being further fully advised in the premises, now, therefore, makes the following

FINDINGS OF FACT:

FIRST: That on and prior to the 4th day of February 1930, the Plaintiff W. E. James, by right of discovery and location, was the owner of and entitled to the immediate possession of certain placer mining ground and claims, held by the per-

formance of annual labor, subject to the paramount title of the United States of America, to wit:

Discovery on Bonanza Creek

No. 1 Above Discovery on Bonanza Creek

No. 5 Above Discovery on Bonanza Creek

No. 6 Above Discovery on Bonanza Creek

No. 14 Above Discovery on Bonanza Creek

No. 15 Above Discovery on Bonanza Creek

Discovery Fraction on Bonanza Creek

No. 5 Fraction Above Discovery on Bonanza
Creek

Discovery on Gold Run Creek

Discovery Annex on Gold Run Creek

No. 1 Cathenda Creek

No. 1 Little Eldorado Creek

No. 3 Little Eldorado Creek

No. 1 Fraction on Little Eldorado Creek

Discovery Bench on Little Eldorado Creek

No. 1 Discovery Bench on Little Eldorado
Creek

No. 2 Discovery Bench on Little Eldorado
Creek

No. 3 Discovery Bench on Little Eldorado
Creek

No. 1 Gold Bug Bench on Little Eldorado
Creek [134]

No. 2 Gold Bug Bench on Little Eldorado
Creek

No. 3 Gold Bug Bench on Little Eldorado
Creek

James Bench on Little Eldorado Creek

the notices of which are all of record in the office of the Recorder for Chisana Recording Precinct, at Chisana, Alaska; and also certain personal property described as a sawmill and cabin located near the Postoffice of the Town of Chisana, Alaska, and one large cabin located in the Town of Chisana, Alaska, known as the James Cabin.

SECOND: That on the 5th day of February, 1930, the Plaintiffs made, executed and delivered to the First Bank of Cordova, a banking corporation organized and existing under the Laws of the Territory of Alaska, a certain mortgage as security for the payment of Five Thousand One Hundred Fifty (\$5,150.00) Dollars, in lawful money of the United States, together with interest thereon at the rate of twelve (12) per cent per annum, according to the terms and conditions of four (4) certain promissory notes due one year after date made by the Plaintiffs, payable to the First Bank of Cordova, as more fully appears from the original mortgage, recorded on September 30, 1932, in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson, Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska, a certified copy of which is attached to the complaint herein.

THIRD: That during all the times herein mentioned the Defendant, O. A. Nelson, was and is the owner of the Chitina Cash Store of Chitina, Alaska; and that at the time the Plain- [135] tiffs executed the aforesaid notes, said Chitina Cash Store became

the indorser upon certain of the notes given by the Plaintiffs to said First Bank of Cordova in the total amount of Two Thousand Eight Hundred Fifty (\$2,850.00) Dollars.

That, in addition thereto, and prior to April 11th, 1933, the Plaintiffs became indebted to the Chitina Cash Store in the further sum of Five Hundred Thirty-two (\$532.00) Dollars, upon an open account.

That during the year 1933, and subsequent to the 11th day of April, 1933, the First Bank of Cordova assigned to the Defendant, O. A. Nelson, all their right, title and interest in and to the aforesaid mortgage and the notes given to secure the same, and that the said O. A. Nelson is now the owner and holder of said mortgage and notes.

That the total indebtedness due and owing by the Plaintiffs to the Defendant, O. A. Nelson, growing out of all the transactions between the parties mentioned in this and the preceding paragraph, is the sum of Eight Thousand One Hundred Twenty-two and 64/100 (\$8,122.64) Dollars.

FOURTH: That during the month of January, 1932, the First Bank of Cordova instituted suit against the Plaintiffs for the foreclosure of the mortgage above mentioned, which said action was pending in the District Court for the Territory of Alaska, Third Division, at the time of the institution of the within cause, but which said action was dismissed prior to the hearing hereof.

FIFTH: That on or about the 11th day of April, 1933, the Defendant, O. A. Nelson, at the

instance and request of the Plaintiffs in this action, came to Chisana, Alaska, the home of the Plaintiffs, representing the First Bank of Cordova, [136] for the purpose of consummating a plan whereby the indebtedness of the Plaintiffs to the First Bank of Cordova and the Chitina Cash Store might be paid. That pursuant thereto, the Defendant, O. A. Nelson, submitted a proposition to Plaintiffs whereby the Plaintiffs were to convey to him as Trustee for the First Bank of Cordova all of the above described property and mining claims of Plaintiffs, in consideration of which the said Bank would operate Plaintiffs' mining claims, and from the proceeds thereof would pay off the indebtedness to the Bank and to the Chitina Cash Store, the trust thus created to be terminated at the end of five years.

That the Plaintiffs refused to accept said proposition, and offered a counter-proposition to the Bank whereby they would convey outright to the Defendant, O. A. Nelson, as Trustee for the First Bank of Cordova, the aforesaid mining claims, in consideration of which the said Bank would pay off the Plaintiffs' entire indebtednesses to all of their creditors, including the First Bank of Cordova and the Chitina Cash Store; and in pursuance thereof, Plaintiffs then and there furnished to said Defendant, O. A. Nelson, a list of all their other creditors.

That in continuation of their negotiations, the Plaintiffs executed a Deed and Bill of Sale to the

Defendant, O. A. Nelson, as Trustee, which said instrument they believed and understood was a Deed only and was given to O. A. Nelson as Trustee for the First Bank of Cordova. That said instrument was signed by Plaintiffs in the presence of one witness, one Luella Johnston, and without the presence of one C. H. Gillam, both of whom subscribed their names as witnesses to [137] the same. That said instrument was not acknowledged. That it was recorded on April 15, 1933, in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson, the Defendant, as Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska, a certified copy of which is attached to the complaint in this action.

That said instrument was executed and delivered to Defendant, O. A. Nelson, upon the express condition that if the First Bank of Cordova would not accept the counter-proposition made by Plaintiffs, the same was to be returned to them by next mail, or in thirty days' time.

SIXTH: That the dealings between the parties were never consummated, in that at no time thereafter was the proposition of the First Bank of Cordova accepted by the Plaintiffs, nor the counter-proposition of the Plaintiffs accepted by the First Bank of Cordova; that there was never a meeting of minds between the parties; and that said deed never became effective or valid.

SEVENTH: That the said Defendant, O. A. Nelson, has at all times refused to return the trust

deed to the Plaintiffs; that he immediately after obtaining possession of the deed unlawfully and fraudulently converted said property and mining claims described in said deed to himself, and has at all times since the 11th day of April, 1933, exercised full control, ownership and dominion over the property described in said deed.

EIGHTH: That on or about the 17th day of April, 1933, the said Defendant, O. A. Nelson, gave a purported lease of certain mining claims and property described in the trust deed to one [138] N. P. Nelson, as follows:

All of the Bench Ground lying opposite No. 1 on Little Eldorado, Little Eldorado Creek, and extending up to No. 8 on Bonanza Creek.

No. 5 Above Discovery on Bonanza Creek, 1320 feet by 660 feet, more or less.

No. 5 Fraction Above Discovery on Bonanza Creek, 78 feet by 660 feet, more or less.

No. 6 Above Discovery on Bonanza Creek, 1320 feet by 660 feet, more or less.

No. 1 on Little Eldorado Creek, 1320 feet by 660 feet, more or less.

No. 1 Fraction on Little Eldorado Creek, 81 feet by 660 feet, more or less.

No. 1 Discovery Bench on Little Eldorado Creek, 1320 feet by 660 feet, more or less.

No. 2 Discovery Bench on Little Eldorado Creek, 1320 feet by 660 feet.

No. 3 Discovery Bench on Little Eldorado Creek, 1320 feet by 660 feet, more or less

and also

the pipe, tools, and equipment now on Bonanza Creek and formerly in the possession and belonging to W. E. James, and also the use of the Sawmill located at Chisana.

That by the terms of said lease the Defendant, O. A. Nelson, as lessor, was to receive ten (10) per cent of the gross recoveries of gold from the operations upon said mining ground; that the period of the lease was from April 17th, 1933, to October 1st, 1942.

That said purported lease was not acknowledged; that it was signed in the presence of.....

That said purported lease was recorded onin Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson, Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska.

That the Plaintiffs never authorized the execution and delivery of said purported lease, had no notice of the same, [139] and never ratified it; and that prior to the time when the Defendant, N. P. NELSON, took possession of the property under said purported lease, the Plaintiffs had notices posted upon the property covered by the purported lease and upon their cabins and the sawmill located thereon declaring their ownership in said property and warning trespassers to keep off.

That said lease is invalid and ineffective for the reason that the said O. A. NELSON, Defendant

herein, acquired no title under the trust deed heretofore mentioned, and, therefore, had no right to make a conveyance thereunder; and for the further reason that said trust deed was not acknowledged in accordance with the provisions of the laws of the Territory of Alaska, and was therefore, not entitled to record, and constituted no notice to the Defendant, N. P. NELSON, of title in the said O. A. NELSON; and for the further reason that said purported lease was never executed, witnessed, or acknowledged in accordance with the provisions of the laws of the Territory of Alaska relating thereto. That said purported lease constitutes a cloud upon the title of Plaintiffs' property.

NINTH: That on or about the 3rd day of June, 1933, the Defendant, O. A. NELSON, gave a purported lease to the Defendant, Charles Hawkins, to expire October 1st, 1937, upon the following described property;

No. 1 on Cathenda Creek

Discovery on Bonanza Creek

No. 1 Above Discovery on Bonanza Creek

in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska; and that thereafter said Defendant gave a purported lease to said Charles Hawkins, bearing date February 19th, 1934, to expire October 1st, [140] 1937, upon the following described property:

Discovery Fraction on Bonanza Creek

in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska.

That the Defendant, CHARLES HAWKINS, has surrendered said purported leases and disclaims no further interest therein and that he has abandoned the property described in same.

That the Plaintiffs never authorized the execution and delivery of the purported leases to the Defendant, CHARLES HAWKINS, had no notice of the same, and never ratified them; and that prior to the time when said Defendant took possession of the property described in said purported leases, the Plaintiffs had notices posted upon the property covered thereby and upon their cabins located thereon declaring their ownership in said property and warning trespassers to keep off.

That said leases are invalid and ineffective for the reason that the said O. A. NELSON, Defendant herein, acquired no title under the trust deed heretofore mentioned, and, therefore, had no right to make a conveyance thereunder; and for the further reason that said trust deed was not acknowledged in accordance with the provisions of the laws of the Territory of Alaska, and was, therefore, not entitled to record, and constituted no record notice to the Defendant, CHARLES HAWKINS, of title in the said O. A. NELSON; and for the further reason that said leases were never executed, witnessed or acknowledged in accordance with the provisions of the laws of the Territory of Alaska

relating thereto. That said purported leases con-[141] stitute a cloud upon the title of Plaintiffs' property.

To all of which Findings the Defendants, and each of them, except, and their exceptions are hereby allowed.

DONE in Open Court this.....day of February, 1935.

.....
Judge.

AND from the foregoing Findings of Fact, the Court makes the follownig

CONCLUSIONS OF LAW:

FIRST: That the Plaintiffs are entitled to a decree cancelling and setting aside the aforesaid Deed and Bill of Sale executed by the Plaintiffs, W. E. James and Agnes James, husband and wife, to the Defendant, O. A. Nelson, as Trustee, bearing date April 11th, 1933, recorded on April 15, 1933, in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson, as Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska.

SECOND: That the Plaintiffs are entitled to a decree cancelling and setting aside the aforesaid Lease made, executed and delivered by O. A. NELSON, as Lessor, to N. P. NELSON, as Lessee, bearing date April 17, 1933, expiring October 1, 1942, covering certain mining claims and property included within the Deed and Bill of Sale mentioned in Paragraph FIRST just above related.

THIRD: That the Plaintiffs are entitled to a decree cancelling and setting aside the aforesaid Lease made, executed [142] and delivered by O. A. NELSON, as Lessor, to CHARLES HAWKINS, as Lessee, bearing date June 3, 1933, to expire October 1st, 1937, covering certain mining claims and property included in the Deed and Bill of Sale mentioned in paragraph FIRST just above related.

FOURTH: That the Plaintiffs are entitled to a decree cancelling and setting aside the aforesaid Lease made, executed and delivered by O. A. NELSON, as Lessor, to CHARLES HAWKINS, as Lessee, bearing date February 19th, 1934, to expire October 1st, 1937, covering certain mining claims and property included in the Deed and Bill of Sale mentioned in Paragraph FIRST above related.

FIFTH: That the Plaintiffs are entitled to a decree cancelling and setting aside the aforesaid Lease made, executed and delivered by O. A. NELSON, as Lessor, to CHARLES McMAHAN as Lessee, which said lease was surrendered on or about the 1st day of July, 1934, and in which the Defendant, Charles McMahan, claims no further interest therein.

SIXTH: That the Plaintiffs are entitled to their costs to be taxes herein, and to attorneys' fees in the sum of \$.....

To all of which the Defendants, and each of them, excepts and their exceptions are allowed.

DONE in Open Court this.....day of February, 1935.

.....
Judge

To this refusal to find as set forth in the above and to the refusal to sign the above, the Plaintiffs except and an exception allowed March 13, 1935.

SIMON HELLENTHAL

District Judge

Presented by

LADY WILLIE FORBUS

Copy received this 12th day of February 1935.

DONOHUE & DONOHUE

Attorneys for Defendants

[Endorsed]: Filed March 13, 1935. [143]

II.

That subsequently and on March 13th, 1935, the Court did make, file and enter its Findings of Fact and Conclusions of Law and Decree based thereon, to all of which Plaintiffs excepted and which exceptions were by the Court allowed, the same being as follows:

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing the fourteenth day of February, 1935, before Simon Hellenenthal, Judge of the District Court for the Territory of Alaska, Third Division, sitting in Equity at Cor-

dova, Alaska, upon the complaint of the plaintiffs as amended; the separate answers of the defendants; the cross complaint of O. A. Nelson, the counter claims of N. P. Nelson and Charles Hawkins, and the replies of the plaintiffs, the plaintiffs appearing in person and by their attorneys L. V. Ray, Esquire, and Lady Willie Forbus, and the defendants O. A. Nelson and N. P. Nelson appearing in person and by their attorney, Thomas M. Donohoe, Esquire; and the defendants Charles Hawkins and Charles McMahan appearing [144] by their attorney Thomas M. Donohoe, Esquire, whereupon the plaintiffs introduced their testimony in chief, the defendants introduced their testimony, and the plaintiffs having introduced their testimony in rebuttal, and all the parties having introduced all of their testimony and having rested, and respective counsel having addressed the court, and the court being fully advised, finds:

I.

That the plaintiffs by right of discovery and location and by performance of annual labor, subject to the paramount title of the United States of America and the mortgage hereinafter referred to, are the owners, and entitled to the immediate possession, except certain rights given to the defendant N. P. Nelson by virtue of a lease hereinafter set forth, of the following described placer mining claims to-wit:

Those certain placer mining claims, situated upon Bonanza Creek, a tributary of Cathenda

Creek, on Gold Run Creek, a tributary of Glacier Creek; on Cathenda Creek and on Little Eldorado Creek, a tributary of Bonanza Creek; all of said claims being in the White River Mining District of the Chisana Recording District, Territory of Alaska, and known and called as follows, to-wit:

Discovery of Bonanza Creek

No. 1 Above Discovery on Bonanza Creek

No. 5 Above Discovery on Bonanza Creek

No. 6 Above Discovery on Bonanza Creek

No. 14 Above Discovery on Bonanza Creek

No. 15 Above Discovery on Bonanza Creek

Discovery Fraction on Bonanza Creek

No. 5 Fraction Above Discovery on Bonanza Creek

Discovery on Gold Run Creek

Discovery Annex on Gold Run Creek

No. 1 Cathenda Creek

No. 1 Little Eldorado Creek

No. 3 Little Eldorado Creek

No. 1 Fraction Little Eldorado Creek

No. 1 Gold Bug Bench on Little Eldorado Creek

No. 2 Gold Bug Bench on Little Eldorado Creek

No. 3 Gold Bug Bench on Little Eldorado Creek

James Bench on Little Eldorado Creek

the notices of which are all of record in the office of the [145] Recorder for Chisana Re-

ording Precinct, at Chisana, Alaska, to which records reference is hereby made for a further and more complete description of said claims, and to saw mill and cabin located near the Post Office of the town of Chisana, Alaska, and to one large cabin located in the town of Chisana, Alaska, and known as the James cabin.

II.

That on the fifth day of February, 1930, the plaintiffs herein made and executed a mortgage on the claims hereinbefore referred to, to the First Bank of Cordova, as security for the payment of certain sums which were then due the First Bank of Cordova, as evidenced by certain promissory notes.

III.

That the plaintiffs, in addition to the amount they owed the First Bank of Cordova, also owed and were indebted to the Chitina Cash Store owned in part by O. A. Nelson. That on the 11th day of April, 1933, negotiations were entered into between O. A. Nelson on behalf of himself, the First Bank of Cordova, and the Chitina Cash Store, and the plaintiffs under which the said O. A. Nelson was to take title to the plaintiffs' property, in consideration of cancelling the debt due the First Bank of Cordova and the Chitina Cash Store, it not being definitely determined whether certain other obligations of the plaintiffs were also to be paid as part of the consideration for said deed, at which time the plaintiffs made, executed and delivered that certain

paper writing, a copy of which is attached to the complaint, called "Deed and Bill of Sale", Exhibit B, purporting to be an indenture made the 11th day of April 1933, between the plaintiffs as first parties, and O. A. Nelson, Trustee, second party, conveying all of the afore- [146] mentioned mining property of the plaintiffs, and also a saw mill and cabin located near the Post Office in the town of Chisana, Alaska, and one large cabin located in the town of Chisana and known as the James cabin, together with all houses, buildings, pipe, giants, flumes, tools, machinery and equipment of every kind and nature upon the said mentioned property, or any of them, or in any manner connected therewith, to the said O. A. Nelson, Trustee, one of the defendants herein, which is in words and figures as follows:

DEED AND BILL OF SALE

"THIS INDENTURE, Made this 11st day of April, 1933, between W. E. JAMES and AGNES JAMES husband and wife, of Chisana, Alaska, the parties of the first part, and O. A. NELSON, Trustee, of Chitina, Alaska, the party of the second part, WITNESSETH:

"The said parties of the first part, for and in consideration of the sum of One (\$1.00) Dollar and other good and valuable consideration by them received, do by these presents Grant, Bargain, Sell, Convey and Confirm unto the said party of the second part, and to his heirs and assigns, the following described property:

"Placer Mining Claims: Discovery on Bonanza Creek; No. 1 Above Discovery on Bonanza

Creek, No. 5 Above Discovery on Bonanza Creek, No. 6 Above Discovery on Bonanza Creek, No. 14 Above Discovery on Bonanza Creek, No. 15 Above Discovery on Bonanza Creek, Discovery Fraction on Bonanza Creek, No. 5 Fraction Above Discovery on Bonanza Creek, Discovery on Gold Run Creek, Discovery Annex on Gold Run Creek, No. 1 *Chathenda* Creek, No. 1 Little Eldorado Creek, No. 3 Little Eldorado Creek, Discovery Bench on Little Eldorado Creek, No. 1 Discovery Bench on Little Eldorado Creek, No. 2 Discovery Bench on Little Eldorado Creek, No. 3 Discovery Bench on Little Eldorado Creek, No. 1 Fraction on Little Eldorado Creek, No. 1 Gold Bug Bench on Little Eldorado Creek, No. 2 Gold Bug Bench on Little Eldorado Creek, No. 3 Gold Bug Bench on Little Eldorado Creek, and James' Bench on Little Eldorado Creek; all situated on Gold Run and Bonanza Creeks and tributaries, [147] in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska; and also together with a sawmill and cabin located near the post office in the town of Chisana, Alaska, and one large cabin located in the town of Chisana and known as the James cabin; and also together with all houses, buildings, pipe, giants, flumes, tools, machinery and equipment of every kind and nature upon the said mentioned properties, or any of them, or in any manner connected therewith.

To have and to hold the same, together with the dips, angles, spurs, ores, minerals, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, forever.

“The said parties of the first part, their heirs, executors and administrators, do by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs, executors and administrators, all and singular, the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances, unto the said party of the second part, his heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will Warrant and forever Defend.

“IN WITNESS WHEREOF, the said Parties of the first part have hereunto set their hands and seals the day and year first above written.

[Seal]

W. E. JAMES

[Seal]

AGNES JAMES

Signed, Sealed and Delivered in the Presence of:
LUELLE JOHNSTON
C. H. GILLAM”

IV.

That thereafter the plaintiffs, W. E. James and Agnes James told and informed the defendant, N. P. Nelson that they had made, executed and delivered the deed above mentioned to the defendant O. A. Nelson. [148]

V.

Thereafter and on the 17th day of April, 1933, the defendant, O. A. Nelson, with the full knowledge of the plaintiffs herein, made, executed and delivered to the defendant N. P. Nelson, a lease, or lay, covering the following described mining claims:

No. 5 Above Discovery on Bonanza Creek

No. 5 Fraction Above Discovery on Bonanza Creek

No. 6 Above Discovery on Bonanza Creek

No. 1 and No. 1 Fraction on Little Eldorado Creek

Nos. 1, 2 and 3 Discovery Bench on Little Eldorado Creek,

all being placer mining claims on Bonanza Creek and tributaries in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska which said lease, or lay, is in words and figures as follows, to-wit:

LEASE

“THIS AGREEMENT, made and entered into this 17th day of April, 1933, by and between O. A. Nelson, first party and N. P. Nelson, second party, WITNESSETH:

“That the first party for and in consideration of the sum of One (\$1.00) Dollar and other good and valuable considerations to him in hand paid by the second party, the receipt whereof is hereby acknowledged and of the rents, conditions and covenants to be paid and performed by the second party as here-

inafter set forth does hereby lease and remise to the second party, upon the terms hereinafter expressed, the following described placer mining ground situated in the White River Mining District, Territory of Alaska and more particularly described as follows, to-wit: [149]

“All of the bench ground lying opposite No. One on Little Eldorado Creek and extending up to No. 8 on Bonanza Creek.

“No. Five Above Discovery on Bonanza Creek, 1320x660 feet, more or less,

“No. Five Fraction Above Discovery on Bonanza Creek 78x660 feet, more or less,

“No. Six Above Discovery on Bonanza Creek 1320x660 Feet, more or less,

“No. One on Little Eldorado Creek, 1320x660 feet, more or less,

“No. One Fraction on Little Eldorado Creek 81x660 feet, more or less,

“No. One Discovery Bench on Little Eldorado Creek 1320x660 feet, more or less,

“No. Two Discovery Bench on Little Eldorado Creek 1320x660 Feet.

“No. Three Discovery Bench on Little Eldorado Creek 1320x660 feet, more or less

for a term to expire on the first day of October, 1942, nineteen hundred forty , unless sooner terminated by a failure to do and perform the terms, covenants and conditions of this agreement; and the second party agrees that he will enter into possession of said hereinbefore described properties

and will during the said period work, mine and prospect parts and portions thereof, and said mining operations shall be carried on by him in a workman and minerlike fashion, and in a manner having in view the preservation of the said claims as workable mines; and [150] that from the gold extracted from said property he will pay to the said first party as royalty ten (10%) per cent of the gross amount of gold

——“Provided also that the said lessee N. P. Nelson shall have the use of the pipe, tools and equipment now on Bonanza Creek and formerly in the possession and belonging to W. E. James, and also the use of the saw mill located at Chisana insofar as the said saw mill may be owned by, in the possession of, or controlled by the said Lessor.”——mined and extracted by him from said claims, which said royalty shall be paid to the first party immediately after each cleanup; that the first party hereby reserves the right to be present at each and every cleanup, either in person or by a representative, and also the right to pan the ground for the purpose of determining the values of gold contained in said ground.

“The second party agrees that he will not allow any valid lien or encumbrance to be created against said property for work or labor done in mining or development of said property, or for goods, wares or material used in mining or development of the same; That the second party shall not sub-let, without the consent of the first party in writing,

any part or portion of the property hereinbefore described.

“And it is further hereby expressly understood and agreed that in the event that the second party shall fail to comply with and perform all of the covenants, and agreements expressed herein, which said party has agreed to perform, or shall fail to pay unto the first party the royal- [151] ties herein as said royalties shall become due and payable according to the terms of this lease, then and in that event the said second party shall forfeit all rights under this lease and will peaceably surrender the possession of said property unto the first party.

“IN WITNESS WHEREOF the said parties hereto have hereunto set their hands this 17th day of April, 1933.

O. A. NELSON

First Party

N. P. NELSON

Second Party

Signed, sealed and delivered in the presence of
M. N. CHASE

VI.

That thereupon the defendant N. P. Nelson entered into possession of the mining claims above described with the full knowledge and consent of the plaintiffs herein, and spent large amounts of money in bringing water to said claims and developing said claims, and ever since said date has been and now is in lawful and peaceful possession thereof.

VII.

That on the 30th day of June, 1933, the defendant O. A. Nelson, acting for himself and associates, notified the plaintiff W. E. James that he would not at that time be able to go on with the proposition in connection with which the deed had been given, and left the matter open for further negotiations; that the terms of this agreement in connection with which said deed was given were never fully agreed upon between the parties, and later in the Fall of 1933 the arrangement was definitely rejected by the plaintiffs. [152]

VIII.

That on the third day of June, 1933, the defendant O. A. Nelson made a lease covering part of the property herein described, to Charles Hawkins, and the defendant O. A. Nelson made a further lease to the said Charles Hawkins on February 19, 1934, also covering part of the property herein described; that the defendant Charles Hawkins has wholly failed to enter into possession of said property or to make any improvement on said property.

IX.

That the defendant O. A. Nelson made and executed a lease to Charles McMahan covering part of the property herein described, which lease was made on or about the seventeenth day of December, 1933; that the defendant Charles McMahan never entered into possession of said property, made no improvements thereon, and has surrendered said lease.

And from the foregoing, the court concludes as a

matter of law that a decree should be entered adjudging:

1. That the plaintiffs are the owners, subject to the paramount title of the United States of America, and the mortgage herein referred to, and are entitled to the immediate possession except certain rights given to the defendant, N. P. Nelson, of the following described placer mining claims, to-wit:

Those certain placer mining claims, situated upon Bonanza Creek, a tributary of Cathenda Creek, on Gold Run Creek, a tributary of Glacier Creek; on Cathenda Creek and on Little Eldorado Creek, a tributary of Bonanza Creek; all of said claims being in the White River Mining District of the Chisana Recording District, Territory of Alaska, and known and called as follows, to-wit: [153]

Discovery of Bonanza Creek

No. 1 Above Discovery on Bonanza Creek

No. 5 Above Discovery on Bonanza Creek

No. 6 Above Discovery on Bonanza Creek

No. 14 Above Discovery on Bonanza Creek

No. 15 Above Discovery on Bonanza Creek

Discovery Fraction on Bonanza Creek

No. 5 Fraction Above Discovery on Bonanza Creek

Discovery on Gold Run Creek

Discovery Annex on Gold Run Creek

No. 1 Cathenda Creek

No. 1 Little Eldorado Creek

No. 3 Little Eldorado Creek

No. 1 Fraction Little Eldorado Creek

No. 1 Gold Bug Bench on Little Eldorado
Creek

No. 2 Gold Bug Bench on Little Eldorado
Creek

No. 3 Gold Bug Bench on Little Eldorado
Creek

James Bench on Little Eldorado Creek

the notices of which are all of record in the office of the Recorder for Chisana Recording Precinct, at Chisana, Alaska, to which records reference is hereby made for a further and more complete description of said claims, and to saw mill and cabin located near the Post Office of the Town of Chisana, Alaska, and to one large cabin located in the town of Chisana, Alaska, and known as the James cabin.

2. That the deed of the plaintiffs executed on the 11th day of April, 1933, to O. A. Nelson, Trustee should be set aside and held of no further effect, which deed is hereinbefore set forth.

3. That the defendant, O. A. Nelson, acted as trustee and agent for the plaintiffs in making the lease with N. P. Nelson, which lease has been set forth in full in these findings, and that the plaintiffs are estopped from denying the validity of said lease, except as to the first parcel described in said lease as "all of the bench ground lying opposite No. 1 on Little Eldorado Creek, and extending up to No. 8 on Bonanza Creek," said parcel not having

been included in the counter claim of the defendant, N. P. Nelson.

4. That said lease remain in force and effect except as to the parcel above mentioned, the same as though [154] it had been executed by the plaintiffs, and that all rights and privileges accruing under said lease to the said O. A. Nelson accrue to and be exercised by the plaintiffs the same as though said lease were made by the plaintiffs instead of the said O. A. Nelson.

5. That the leases given to Charles Hawkins be cancelled and are of no further force and effect.

6. That the lease given to Charles McMahan has been surrendered and is of no further force and effect.

7. That neither plaintiffs nor any of the defendants recover costs, attorneys fees, or disbursements.

To the foregoing findings and conclusions and to each and every one of the same the plaintiffs and the defendant O. A. Nelson except, and exceptions are allowed the plaintiffs and said O. A. Nelson.

Dated at Valdez, Alaska, this 13 day of March, 1935.

SIMON HELLENTHAL

District Judge

Entered Court Journal No. V 17 Page No. 694.
March 13, 1935.

[Enodrds]: Filed March 13, 1935. [155]

[Title of Court and Cause.]

DECREE.

This matter having come on for hearing the fourteenth day of February, 1935, before Simon Helenthal, Judge of the District Court for the Territory of Alaska, Third Division, sitting in Equity at Cordova, Alaska, and the court having made findings of fact and conclusions of law which are hereby referred to and made a part hereof, and being fully advised, *it is*

IT IS ORDERED AND DECREED:

1. That the plaintiffs are the owners, subject to the paramount title of the United States of America, and the mortgage herein referred to, and are entitled to the immediate possession except certain rights given to the defendant N. P. Nelson, of the following described placer mining claims, to-wit:

Those certain placer mining claims, situated upon Bonanza Creek, a tributary of Cathenda Creek; on Gold Run Creek, a tributary of Glacier Creek; on Cathenda Creek and on Little Eldorado Creek, a tributary of Bonanza Creek; all of said claims being in the White River Mining District of the Chisana Recording District, Territory of Alaska, and known and called as follows, to-wit:

Discovery of Bonanza Creek

No. 1 Above Discovery on Bonanza Creek

No. 5 Above Discovery on Bonanza Creek

No. 6 Above Discovery on Bonanza Creek

No. 14 Above Discovery on Bonanza Creek

No. 15 Above Discovery on Bonanza Creek

[156]

Discovery Fraction on Bonanza Creek

No. 5 Fraction Above Discovery on Bonanza Creek

Discovery on Gold Run Creek

Discovery Annex on Gold Run Creek

No. 1 Cathenda Creek

No. 1 Little Eldorado Creek

No. 3 Little Eldorado Creek

No. 1 Fraction Little Eldorado Creek

No. 1 Gold Bug Bench on Little Eldorado Creek

No. 2 Gold Bug Bench on Little Eldorado Creek

No. 3 Gold Bug Bench on Little Eldorado Creek

James Bench on Little Eldorado Creek

the notices of which are all of record in the office of the Recorder for Chisana Recording Precinct, at Chisana, Alaska, to which records reference is hereby made for a further and more complete description of said claims, and to saw mill and cabin located near the Post Office of the town of Chisana, Alaska, and to one large cabin located in the town of Chisana, Alaska, and known as the James Cabin.

and the title to said property and the mining claims be and the same is hereby quieted in the plaintiffs *W. F. James and Agnes James* against

the defendants, except as to the mortgage and lease referred to in the findings herein.

2. That that certain Deed and Bill of Sale executed by W. E. James and Agnes James, husband and wife, to the defendant O. A. Nelson, as trustee, bearing date of April 11, 1933, recorded on April 15, 1933, in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson as commissioner and ex-officio recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska, be and the same is hereby set aside, annulled and cancelled and declared to be of no further force and effect, which said deed is set forth in full in the findings of fact herein.

3. That the defendant O. A. Nelson acted as trustee for the plaintiffs in making the lease with N. P. Nelson, which lease has been set forth in full in the findings of fact herein, and that the plaintiffs are estopped from denying the validity of said lease, [157] except as to the first parcel described in said lease as "all of the bench ground lying opposite No. 1 on Little Eldorado Creek and extending up to No. 8 on Bonanza Creek."

4. That said lease is binding and is to remain in force and effect except as to the parcel above mentioned, the same as though it had been executed by the plaintiffs, and that all rights and privileges accruing under said lease to the said O. A. Nelson are hereby decreed to accrue to and to be exercised by the plaintiffs the same as though said lease were made by the plaintiffs instead of the said O. A. Nelson.

5. That the leases given to Charles Hawkins referred to in the findings of fact herein be and the same are hereby decreed to be of no further force and effect.

6. That the lease given to Charles McMahan has been surrendered and is of no further force and effect.

7. That neither plaintiffs nor any of the defendants recover costs, attorneys fees or disbursements.

To the foregoing decree and to each and every part thereof the plaintiffs and defendant O. A. Nelson except, and exceptions are allowed plaintiffs and the said O. A. Nelson.

Dated at Valdez, Alaska, this 13th day of March, 1935.

SIMON HELLENTHAL,
District Judge.

Entered Court Journal No. 17, Page No. 698,
Mar. 13, 1935.

[Endorsed]: Filed March 13, 1935. [158]

III.

That thereafter and on the 6th day of May 1935, at a date less than three months from the date of entry of said Decree, plaintiffs filed in said cause a petition for re-hearing, as follows:

[Title of Court and Cause.]

PETITION FOR RE-HEARING.

To the Honorable Simon Hellenthal, Judge of the
above-entitled Court:

The petition of the plaintiffs, W. E. James and Agnes James, respectfully sheweth unto your Honor that, being aggrieved by the Decree entered in this cause on the 13th day of March, 1935 by the terms of which Decree certain mining property and personal property, as in said Decree fully described, were found by this Honorable Court to be subject to a certain lease dated the 17th day of April, 1933, by and between O. A. Nelson, as first party, and N. P. Nelson, second party, said instrument being set forth in full in the Findings of Fact heretofore made and entered in this cause, being numbered V in said Findings of Fact, and covering a certain portion of the property of the plaintiffs, as described in said Decree, based upon other Findings of Fact made by said Honorable Court, which said Findings of Fact were in substance to the effect that [159] the plaintiffs acquiesced in and had full knowledge of the possession of the said N. P. Nelson of the property described in said lease; and further, that it also appears, as a matter of record, that the said N. P. Nelson extracted gold from said lease-hold properties, during the mining season of 1934, in the approximate sum of Nine Thousand Dollars (\$9,000.00) but that no knowledge thereon was made to the plaintiffs in accordance with the terms of said lease as to the amount of royalties to be paid to the said O. A. Nelson, the lessor in said lease named, and petitioners also aver that said Decree, by its provisions and terms, did not make direction or determination

with reference to said 10% of said Nine Thousand Dollars (\$9,000.00).

WHEREFORE, your petitioners humbly pray that your Honor will grant a re-hearing and said petitioners submit themselves to such orders as the Court may make if this application for re-hearing be without merit.

L. V. RAY,

Of Attorneys for Plaintiffs.

Receipt of copy acknowledged this 6th day of May, 1935.

THOMAS M. DONOHOE,

Attorney for Defendants.

[Endorsed]: Filed May 6, 1935. [160]

IV.

That on May 9, 1935, the Court made the Order permitting the filing of said petition for re-hearing and continuing the same over for determination to a term of Court held at Valdez, Alaska, on the 15th day of July, 1935, said Order being, as follows:

[Title of Court and Cause.]

ORDER.

The above entitled cause came on to be heard on the application and petition of plaintiffs for a re-hearing of said cause and it appearing to the Court that said application and petition for said re-hear-

ing has been filed within the term within which said cause was heard and that the present session of the above entitled court, now being held at Cordova, will soon adjourn and the intervening time will not permit the court to hear and pass upon said petition for re-hearing,

IT IS ORDERED, that said petition for re-hearing be, and is hereby ordered filed and the same is continued over for determination as to whether or not said petition for re-hearing should be granted until the next session of this court to be held at Valdez, Alaska, within the Third Division of the Territory, on the 15th day of July 1935. [161]

Done at Cordova, Alaska, this 9th day of May, 1935.

SIMON HELLENTHAL,

District Judge.

Entered Court Journal No. C-4 Page No. 411
May 9, 1935.

[Endorsed]: Filed May 9, 1935. [162]

V.

That thereafter by Orders duly made, the consideration of said Petition for re-hearing was continued from time to time until October 26, 1935, by Order duly made in such respect and on said date of October 26, 1935, the following Order was made in said cause:

[Title of Court and Cause.]

HEARING ON PETITION FOR REHEARING.

Now at this time this cause came regularly on for hearing on plaintiffs' petition for re-hearing heretofore and on the 9th day of May, 1935, filed in the above entitled cause, plaintiffs being represented by L. V. Ray, Esq., and the defendants by Thos. M. Donohoe, Esq.,

Thereupon, the Court being fully and duly advised in the premises, directed the attorneys for both the plaintiffs and the defendants to draw up and submit a supplemental and final decree for his consideration.

Entered Court Journal No. 18, Page No. 57, October 26, 1935. [163]

VI.

That thereafter a Supplemental and Final Decree in said cause was filed by the Judge of said Court on the 9th day of November 1935, to which Supplemental and Final Decree the Plaintiffs excepted and exceptions were duly allowed to said Plaintiffs, which Supplemental and Final Decree was and is as follows:

In the District Court for the Territory of Alaska,
Third Division.

No. S-356.

W. E. JAMES and AGNES JAMES,
Plaintiffs,

vs.

O. A. NELSON, et al.,
Defendants.

SUPPLEMENTAL AND FINAL DECREE.

This matter came regularly on to be heard at a session of the above entitled court held at Valdez within the district and territory aforesaid, on the 26th day of October, 1935, plaintiffs being represented by L. V. Ray, of attorneys of record, and the defendants being represented by Thomas M. Donohoe, Esquire, upon plaintiffs' petition for rehearing heretofore filed in this court pursuant to an order of this court dated the 9th day of May, 1935, permitting and directing said petition for rehearing to be filed in said cause; said petition for rehearing being continued by order of this court in such regard made, to the 15th day of July, 1935, at Valdez, Alaska, and thence, for good cause shown by various orders of the court in such regard made, until the October 14, 1935, regular term of said court at Valdez, Alaska; and during said general term of October 14, 1935, at said Valdez, on the 26th day of October, 1935, the Court did direct the preparation

by counsel and submission to the court for signature a supple- [164] mental and final decree, which supplemental and final decree shall include the terms and provisions of the decree signed by the court on the 13th day of March, 1935, together with an enlargement of such terms and provisions so as to provide for the making of an annual report and account by the lessee, N. P. Nelson, to the plaintiffs in the action, and so as to also include in said decree a copy of said lease to said N. P. Nelson.

WHEREUPON the Court being fully advised in the premises and having heretofore made its findings of fact and conclusions of law, which by reference hereto are made a part of this judgment, it is

ORDERED AND DECREED:

1. That the plaintiffs are the owners, subject to the paramount title of the United States of America, and the mortgage herein referred to, and are entitled to the immediate possession except certain rights given to the defendant N. P. Nelson, of the following described placer mining claims, to-wit:

Those certain placer mining claims, situated upon Bonanza Creek, a tributary of Cathenda Creek; on Gold Run Creek, a tributary of Glacier Creek; on Cathenda Creek and on Little Eldorado Creek, a tributary of Bonanza Creek; all of said claims being in the White River Mining District of the Chisana Recording District, Territory of Alaska, and known and called as follows:

Discovery of Bonanza Creek

No. 1 Above Discovery on Bonanza Creek

No. 5 Above Discovery on Bonanza Creek

No. 6 Above Discovery on Bonanza Creek

No. 14 Above Discovery on Bonanza Creek

No. 15 Above Discovery on Bonanza Creek

Discovery Fraction on Bonanza Creek

No. 5 Fraction Above Discovery on Bonanza Creek

Discovery on Gold Run Creek

Discovery Annex on Gold Run Creek

No. 1 Cathenda Creek

No. 1 Little Eldorado Creek

No. 3 Little Eldorado Creek

No. 1 Fraction Little Eldorado Creek

No. 1 Gold Bug Bench on Little Eldorado Creek [165]

No. 2 Gold Bug Bench on Little Eldorado Creek

No. 3 Gold Bug Bench on Little Eldorado Creek

James Bench on Little Eldorado Creek

The notices of which are all of record in the office of the Recorder for Chisana Recording Precinct, at Chisana, Alaska, to which records reference is hereby made for a further and more complete description of said claims, and to saw mill and cabin located near the Post Office of the town of Chisana, Alaska, and to one large cabin located in the town of Chisana, Alaska, and known as the James Cabin.

And the title to said property and the mining claims be and the same is hereby quieted in the

plaintiffs W. E. James and Agnes James against the defendants, except as to the mortgage and lease referred to in the findings herein.

2. That that certain Deed and Bill of Sale executed by W. E. James and Agnes James, husband and wife, to the defendant O. A. Nelson as trustee, bearing date of April 11, 1933, recorded on April 15, 1933, in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nelson as commissioner and ex-officio recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska, be and the same is hereby set aside, annulled and cancelled and declared to be of no further force and effect, which said deed is set forth in full in the findings of fact herein.

3. That the defendant O. A. Nelson acted as trustee for the plaintiffs in making the lease with N. P. Nelson which lease has been set forth in full in the findings of fact herein, and that the plaintiffs are estopped from denying the validity of said lease, except as to the first parcel described in said lease as "all of the bench ground lying opposite No. 1 on Little Eldorado Creek and extending up to No. 8 on Bonanza Creek." The lease is in words and figures as follows: [166]

LEASE

THIS AGREEMENT, made and entered into this 17th day of April, 1933, by and between O. A. Nelson, first party and N. P. Nelson, second party,

WITNESSETH:

That the first party for and in consideration of the sum of One (\$1.00) Dollar and other good and valuable considerations to him in hand paid by the second party, the receipt whereof is hereby acknowledged and of the rents, conditions and covenants to be paid and performed by the second party as hereinafter set forth does hereby lease and remise to the second party, upon the terms hereinafter expressed, the following described placer mining ground situated in the White River Mining District, Territory of Alaska, and more particularly described as follows, to-wit:

All of the bench ground lying opposite No. One on Little Eldorado Creek and extending up to No. 8 on Bonanza Creek.

No. Five Above Discovery on Bonanza Creek, 1320x660 feet, more or less,

No. Five Fraction Above Discovery on Bonanza Creek 78x660 feet, more or less,

No. Six Above Discovery on Bonanza Creek 1320x660 feet, more or less,

No. One on Little Eldorado Creek, 1320x660 feet, more or less,

No. One Fraction on Little Eldorado Creek 81x660 feet, more or less,

No. One Discovery Bench on Little Eldorado Creek 1320x660 feet, more or less,

No. Two Discovery Bench on Little Eldorado Creek 1320x660 feet, [167]

No. Three Discovery Bench on Little Eldorado Creek 1320x660 feet, more or less,

for a term to expire on the first day of **October**, 1942, (nineteen hundred forty-two), unless sooner terminated by a failure to do and perform the terms, covenants and conditions of this agreement; and the second party agrees that he will enter into possession of said hereinbefore described properties and will during the said period work, mine and prospect parts and portions thereof, and said mining operations shall be carried on by him in a workman and minerlike fashion, and in a manner having in view the preservation of the said claims as workable mines; and that from the gold extracted from said property he will pay to the said first party as royalty ten (10%) per cent of the gross amount of gold.

—Provided also that the said lessee N. P. Nelson shall have the use of the pipe, tools and equipment now on Bonanza Creek and formerly in the possession and belonging to W. E. James, and also the use of the saw mill located at Chisana insofar as the said saw mill may be owned by, in the possession of, or controlled by the said lessor.—

mined and extracted by him from said claims, which said royalty shall be paid to the first party immediately after each cleanup; that the first party hereby reserves the right to be present at each and every cleanup, either in person or by a representative, and also the right to pan the ground

for the purpose of determining the values of gold contained in said ground. [168]

The second party agrees that he will not allow any valid lien or encumbrance to be created against said property for work or labor done in mining or development of said property, or for goods, wares or material used in mining or development of the same; That the second party shall not sublet, without the consent of the First party in writing, any part or portion of the property hereinbefore described.

And it is further hereby expressly understood and agreed that in the event that the second party shall fail to comply with and perform all of the covenants, and agreements expressed herein, which said party has agreed to perform, or shall fail to pay unto the first party the royalties herein as said royalties shall become due and payable according to the terms of this lease, then and in that event the said second party shall forfeit all rights under this lease and will peaceably surrender the possession of said property unto the first party.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands this 17th day of April, 1933.

O. A. NELSON,

First Party.

N. P. NELSON,

Second Party.

Signed, sealed and delivered in the presence of
M. N. CHASE.

4. That said lease remain in force and effect except as to the parcel above mentioned, the same as though it had been executed by the plaintiffs, and that all rights and privileges accruing under said lease to the said O. A. Nelson accrue to and be exercised by the [169] plaintiffs the same as though said lease were made by the plaintiffs instead of the said O. A. Nelson.

5. That the leases given to Charles Hawkins be cancelled and are of no further force and effect.

6. That the lease given to Charles McMahan has been surrendered and is of no further force and effect.

7. That neither plaintiffs nor any of the defendants recover costs, attorneys fees, or disbursements.

8. That the defendant, N. P. Nelson, at the close of the mining season during each year of the leasehold period contained in said lease shall report in writing the gross amount of gold extracted during such mining season from the leased premises, and deliver to the said plaintiffs, or to their agent, attorneys, or representative, duplicate receipts of all mint or smelter returns and receipts of banks evidencing such gold recovery.

To the foregoing decree the plaintiffs and the defendant O. A. Nelson except, and exceptions are allowed the plaintiffs and said O. A. Nelson.

Dated at Valdez, Alaska, This 9th of November, 1935.

SIMON HELLENTHAL

District Judge

Entered Court Journal No. 18 Page No. 107. Nov.
9, 1935.

[Endorsed]: Filed Nov. 9, 1935. [170]

WHEREFORE, plaintiffs respectfully pray this Honorable Court that the above and foregoing be duly approved, settled and certified as their Bill of Exceptions and that the same be made a part of the record upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and will ever so pray.

LADY WILLIE FORBUS

L. V. RAY

Attorneys for Plaintiffs-Appellants

Receipt of copy of the above and foregoing acknowledged this 27th day of January, 1936.

DONOHOE & DONOHOE

THOMAS M. DONOHOE

Attorneys for Defendants-Appellees.

[Endorsed]: Filed Jan 28 1936. [171]

[Title of Court and Cause.]

BILL OF EXCEPTIONS APPROVAL BY
COUNSEL

This is to certify that the foregoing Bill of Exceptions in the above entitled cause was served on me on the 27th day of January, 1936, and that I have examined the same and have no amendments to suggest thereto, and agree that the same may be

settled and signed as a Bill of Exceptions in said cause by the Honorable Judge of said Court at such time and place as the same may be presented by counsel for plaintiffs in the cause, without my being present and without further notice to me.

Dated January 28th 1936.

DONOHOE & DONOHOE
By THOMAS M. DONOHOE
Attorneys for Defendants [172]

[Title of Court and Cause.]

ORDER SETTLING AND CERTIFYING
BILL OF EXCEPTIONS

W. E. James and Agnes James, plaintiffs herein having applied to the Court for an order settling and certifying this Bill of Exceptions to be used on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree entered herein on November 9th, 1935; plaintiffs being represented by L. V. Ray, of their attorneys of record and the defendants being represented by Thomas M. Donohoe, Esq. of the firm of Donohoe & Donohoe; and it appearing that all parties having consented without further notice, to the submission of plaintiffs prepared Bill of Exceptions to the Court for settlement and certification; and it further appearing that said Bill of Exceptions contains a condensed statement of the evidence given in said cause, and that the same has by an order in such respect made been approved as

complete and correct; and the Court having inspected said Bill of Exceptions and being fully advised in the premises,—

IT IS ORDERED, that said Bill of Exceptions is hereby allowed, approved and settled, and that the same be filed herein forthwith as a part of the record of this cause upon appeal.

IT IS FURTHER ORDERED, that this order shall be deemed and taken as a certificate of the undersigned Judge of this Court who presided at the hearing of said cause and before whom all [173] the evidence in said cause was given, that said Bill of Exceptions contains a condensed statement, in narrative form, of all the evidence given in said cause, including pertinent exhibits, upon which the said decree of November 9th, 1935 is based.

DONE by the Court and Ordered entered on this 28th of January 1936.

SIMON HELLENTHAL

District Judge

Entered Court Journal No. C-4 Page 452. Jan 28 1936.

[Endorsed]: Filed Jan 28 1936. [174]

[Title of Court and Cause.]

PETITION OF W. E. JAMES AND AGNES
JAMES FOR APPEAL TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

The above named plaintiffs, W. E. James and Agnes James, conceiving themselves aggrieved by that certain part of the Supplemental and Final Decree made and entered in this cause on the 9th day of November, 1925, by the above entitled court, wherein said decree determines that the defendant O. A. Nelson acted as trustee and agent for the plaintiffs in making a certain lease dated April 17, 1933, to the defendant N. P. Nelson as lessee, and insofar as said decree declares the plaintiffs are estopped from denying the validity of such lease; the property covered by said lease and said lease itself being fully described and set forth in said Supplemental and Final Decree, do hereby appeal from said part of said Supplemental and Final Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the record, papers and documents upon which said Supplemental and Final Decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals at San Francisco, California.

Dated this 30th day of December, 1935.

L. V. RAY

Of Attorneys for Plaintiffs-
Appellants.

I do hereby acknowledge receipt of a copy for service of the above petition of W. E. James and Agnes James, appellants, on this.....day of....., 193.....

.....
Attorneys for Defendants-Appellees.

[Endorsed]: Filed Jan 7, 1936. [175]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now the plaintiffs in the above entitled cause and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from that certain part of the Supplemental and Final Decree made and entered in this cause on the 9th day of November, 1935, by the above entitled court, wherein said decree determines that the defendants O. A. Nelson acted as trustee and agent for the plaintiffs in making a certain lease dated April 17, 1933, to the defendant N. P. Nelson as lessee, and insofar as said decree declares the plaintiffs are estopped from denying the validity of such lease.

I.

The Court erred in invoking the doctrine of estoppel against the plaintiffs with reference to the lease given by defendant O. A. Nelson to defendant N. P. Nelson on April 17, 1933, upon the ground that the plaintiffs did no acts, committed no fraud,

made no representations, nor created no condition, upon which the doctrine of estoppel could be lawfully predicated. [176]

II.

The Court erred in invoking the doctrine of estoppel against the plaintiffs with reference to the lease given by defendant O. A. Nelson to defendant N. P. Nelson on April 17, 1933, upon the ground that the essential elements of estoppel were wholly lacking, as shown by the testimony of both the plaintiffs and defendants herein.

III.

The Court erred in invoking the doctrine of estoppel against the plaintiffs with reference to the lease given by defendant O. A. Nelson to defendant N. P. Nelson on April 17, 1933, upon the ground that the same had not been pleaded by the defendant N. P. Nelson, and he did not sustain the burden of proof with reference thereto.

IV.

The Court erred in refusing to cancel and set aside the lease from defendant O. A. Nelson to defendant N. P. Nelson dated April 17, 1933, on the ground that the same was fictitious, the royalties grossly inadequate, the terms burdensome and contrary to public policy.

V.

The Court erred in refusing to cancel and set aside the lease from defendant O. A. Nelson to de-

fendant N. P. Nelson, dated April 17, 1933, on the ground that the same was unacknowledged, unwitnessed, unrecorded, and constituted a cloud upon the title of plaintiffs.

VI.

The Court erred in refusing to cancel and set aside the lease from defendant O. A. Nelson to defendant N. P. Nelson, dated April 17, 1933, on the ground that the Deed and Bill of Sale from plaintiffs to defendant O. A. Nelson, as recorded, constituted no notice, constructive or otherwise, to defendant N. P. Nelson, evidencing any right or authority on the part of defendant O. A. Nelson to lease the property covered by said lease to defendant N. P. Nelson dated April 17, 1933. [177]

VII.

The Court erred in refusing to grant the plaintiffs an accounting from the defendants, and each of them, as prayed for in their complaint, upon the ground that the Deed and Bill of Sale theretofore given to defendant O. A. Nelson being void and set aside, all recoveries had under such void lease become the property of plaintiffs and they were immediately entitled to same.

VIII.

The Court erred in finding that defendant O. A. Nelson acted as trustee and agent for the plaintiffs in making the lease to defendant N. P. Nelson, the trial Court having already determined that the

Deed and Bill of Sale, purporting to confer authority upon defendant O. A. Nelson as trustee, was void and of no effect.

IX.

The Court erred in its failure to make and adopt the Findings of Fact proposed by plaintiffs designated in respect to holding the said lease to the defendant O. A. Nelson as invalid, and in respect that the plaintiffs never authorized the execution and delivery of said purported lease and never ratified the same; and that prior to the time when the defendant N. P. Nelson took possession of the property under said purported lease plaintiffs had notices posted upon such property declaring plaintiffs' ownership thereof, and warning trespassers to keep off, upon the ground that the evidence submitted will sustain no other conclusion.

X.

The Court erred in failing to adopt and make of the proposed Conclusions of Law presented by the plaintiffs, the Second thereof, to the effect that the plaintiffs are entitled to a decree cancelling and setting aside a certain lease made and executed by defendant O. A. Nelson as lessor to the defendant N. P. Nelson as lessee, bearing date April 17, 1933, expiring October 1, 1942, covering certain mining claims and [178] property described therein.

XI.

The Court erred in making and rendering a supplemental and final decree in this cause on the

9th day of November, 1935, with respect to that certain part of said supplemental and final decree wherein said decree determines that the defendant O. A. Nelson acted as trustee and agent for the plaintiffs in making a certain lease dated April 17, 1933, to the defendant N. P. Nelson as lessee, and insofar as said decree holds that the plaintiffs are estopped from denying the validity of such lease.

WHEREFORE, the said W. E. James and Agnes James, plaintiffs aforesaid, appellants herein, pray that said decree be reversed as to that particular part thereof herein complained of, and to which error is assigned.

Dated at Seward, Alaska, this 30th day of December, 1935.

LADY WILLIE FORBUS,

L. V. RAY,

Attorneys for Plaintiffs-
Appellants.

[Endorsed]: Filed Jan 7 1936. [179]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING
BOND.

This day came W. E. James and Agnes James, the plaintiffs in the above entitled action, and present their petition for an appeal, and assignment of errors accompanying the same, which petition,

on consideration of the Court, is hereby allowed and the Court allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that part of the Supplemental and Final Decree rendered in said cause on the 9th day of November, 1935, by the above entitled Court in respect to the provisions in said decree wherein it is held that the defendant O. A. Nelson acted as trustee and agent for the plaintiffs in making a certain lease dated April 17, 1933, to the defendant N. P. Nelson as lessee, and insofar as said decree declares that plaintiffs are estopped from denying the validity of such lease; the property covered by said lease and said lease itself being fully described and set forth in said decree, upon the filing of a bond in the sum of two hundred fifty (\$250.00) Dollars, with good and sufficient sureties to be approved by the Court, which bond shall be conditioned to the effect that said plaintiffs shall prosecute their appeal to effect and shall answer all costs if they fail to make good their said plea.

Dated at Seward, Alaska, this 20th day of January, 1936.

SIMON HELLENTHAL,

District Judge.

Entered Court Journal No. S-5, Page No. 275,
Jan 20 1936.

[Endorsed]: Filed Jan. 20, 1936. [180]

[Title of Court and Cause.]

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, That we, W. E. JAMES and AGNES JAMES, as principals, and L. WALN and W. C. STEWART, as sureties, are held and firmly bound unto O. A. Nelson, as an individual, O. A. Nelson, as trustee, N. P. Nelson, Charles Hawkins and Charles McMahan, defendants above named, in the sum of Two Hundred and Fifty Dollars, to be paid to the said defendants, their heirs, executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

SEALED with our seals and dated this 27th day of January 1936.

WHEREAS, the above named plaintiffs have taken an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse the Supplemental and Final Decree entered in the above entitled action by the District Court for the Territory of Alaska, Third Division, which decree was so rendered and entered by said Court on the 9th day of [181] November, 1935, and wherein by the terms of said decree, certain mining claims and personal property therein described were held to be vested in the said plaintiffs, subject to the paramount title of the United States and the lien

of a certain mortgage, described in said decree, but also held said mining property and said personal property subject to a certain lease dated the 17th day of April, 1933, and in which lease one O. A. Nelson is named as lessor and N. P. Nelson as lessee;

NOW, THEREFORE, the condition of the above obligation is such that if the above named W. E. James and Agnes James shall prosecute their appeal to effect and shall answer all costs, then this obligation to be void, otherwise if they fail to make good their plea to remain in full force and effect.

[Seal]

W. S. JAMES

[Seal]

AGNES JAMES

Principals

[Seal]

L. WALN

Surety

[Seal]

W. C. STEWART

Surety

United States of America

Territory of Alaska

Third Division—ss.

L. WALN and W. C. STEWART, being first duly sworn on oath, depose and say, each for himself and not [182] one for the other: That I am one of the sureties on the foregoing bonds; that I am a resident of the Territory of Alaska owning property therein; I am not a counsellor or attorney at law, marshal, clerk of any court or other officer of any court; that I am worth the sum of Two Hundred and Fifty Dollars, specified in the foregoing under-

taking, exclusive of property exempt from execution and over and above just debts and liabilities.

W. C. STEWART

L. WALN

Subscribed and sworn to before me this 27th day of January 1936.

[Notarial Seal] R. G. BAUMGARTEN

Notary Public in and for the Territory of Alaska.

My commission expires 17 September, 1939.

APPROVED This 28th day of January, 1936.

SIMON HELLENTHAL

District Judge

Copy received this 28th day of January 1936.
O. K. as to form.

T. M. DONOHOE

Attorney for Defendants

[Endorsed]: Filed Jan 28 1936. [183]

[Title of Court and Cause.]

CITATION ON APPEAL

To the Defendants, O. A. Nelson, as an individual, O. A. Nelson as a trustee, N. P. Nelson, Charles Hawkins and Charles McMahan, and to their attorneys, Messrs. Donohoe & Donohoe, and Thomas M. Donohoe, Esq.:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Fran-

cisco, California, in said circuit, within thirty days from the date hereof pursuant to an order allowing an appeal, duly entered in the Clerk's office in the District Court for the Territory of Alaska, Third Division, at Seward, Alaska, in that certain action wherein W. E. James and Agnes James are plaintiffs and O. A. Nelson, as an individual, O. A. Nelson as trustee, N. P. Nelson, Charles Hawkins and Charles McMahan are defendants, and wherein the said W. E. James and Agnes James are appellants, to show cause, if any there be, why the Supplemental and Final Decree entered therein on the 9th day of November, 1935, with respect to Clause 3 thereof wherein, by the terms of such decree the trial court held that the defendant O. A. Nelson acted as trustee and agent for the plaintiffs in making that certain lease dated April 17, 1933, to [184] the defendant N. P. Nelson, as lessee, and insofar as said decree, in said Clause 3 thereof, declares the plaintiffs are estopped from denying the validity of such lease; the property covered by said lease and said lease itself being fully described and set forth in said Clause 3 of said Supplemental and Final Decree, shall not be reversed and corrected and why a speedy justice should not be done to them, the said W. A. James and Agnes James, appellants, in their behalf.

WITNESS the Honorable Simon Hellenthal,
Judge of the District Court for the Territory of

Alaska, Third Division, and the seal of said Court hereunto affixed this 28th day of January 1936.

SIMON HELLENTHAL

Judge of the District Court for the Territory of Alaska, Third Division.

Attest:

[Seal]

DERICK LANE

Clerk of said Court

By.....

Deputy

Entered Court Journal No. C-4 Page No. 453.
Jan 28 1936.

Due service and a copy hereof acknowledged this 28th day of January, 1936.

THOMAS M. DONOHOE

Attorney for Defendants.

[Endorsed]: Filed Jan 28, 1936. [185]

[Title of Court and Cause.]

STIPULATION RE PRINTING TRANSCRIPT
OF RECORD.

IT IS STIPULATED between the attorneys for the parties respectively that in printing the record of this case for use in the United States Circuit Court of Appeals, Ninth Circuit, all captions shall be omitted after the title of the cause has once been printed, and the words "Title of Court and

Cause" and the name of the paper or documents shall be substituted therefor. All other parts of the record shall be printed.

Dated this 28th day of January, 1936.

L. V. RAY,

Of Attorneys for Plaintiffs
and Appellants.

THOMAS M. DONOHUE,

Attorney for Defendants and
Appellees.

[Endorsed]: Filed Jan 28 1936. [186]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the District Court, Territory of
Alaska, Third Division:

You will please make, certify and transmit, at the expiration of ten days from the date hereof, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a true copy of all the following indicated portions of the record in the above entitled cause, as the transcript to be used on the appeal of W. E. James and Agnes James, plaintiffs, from the judgment rendered herein on the 9th day of November, 1935, to-wit:

1. Complaint.
2. Demurrer of defendant N. P. Nelson.

3. Demurrer of defendant Charles Hawkins.
4. Demurrer of defendant Charles McMahan.
5. Demurrer of defendant O. A. Nelson, individually and as trustee.
6. Hearing on demurrer.
7. Opinion on demurrer.
8. Order overruling demurrers of all defendant.
9. Separate answer of defendant N. P. Nelson.
10. Separate answer of defendant Charles Hawkins. [187]
- 10¹/₂. Separate answer of defendant O. A. Nelson.
11. Separate answer of defendant Charles McMahan.
12. Reply to answer of O. A. Nelson.
13. Reply to answer of N. P. Nelson.
14. Reply to answer of Charles Hawkins.
15. Reply to answer of Charles McMahan.
16. Motion to amend complaint by interlineation.
17. Hearing on plaintiffs' motion to amend complaint by interlineation; order thereon, with order that defendants' answers to the pleadings as amended stand as filed.
18. Proposed Findings of Fact of Plaintiffs —“Eighth” Finding.

19. Proposed Conclusions of Law of plaintiffs—"Second" Conclusion.
20. Notation of acceptance of service by attorney for defendants, and endorsement thereon by trial judge refusing to make and find said Findings of Fact and Conclusions of Law; allowance of exceptions to plaintiffs March 13, 1935.
21. Proposed decree presented by plaintiffs, together with proof of service thereof, and exception allowed plaintiffs to the refusal of the Court to sign such proposed decree.
22. Findings of Fact and Conclusions of Law as prepared and signed by the Court.
23. Decree.
24. Petition for rehearing.
25. Notice upon petition for rehearing.
26. Order on petition for rehearing.
27. Order of August 5, 1935, setting time for hearing upon Petition for Rehearing for September 9, 1935.
28. Order continuing petition for rehearing to September 11, 1935.
29. Order continuing petition for rehearing to Valdez October term. [188]
30. Order of October 26, 1935.
31. Supplemental and Final Decree.
- 31½. Affidavit of no Opinion.
32. Bill of Exceptions.
33. Order settling and certifying Bill of Exceptions.

34. Petition for appeal.
35. Assignment of Errors.
36. Order allowing appeal and fixing bond.
37. Bond on appeal.
38. Citation on appeal.
39. Stipulation relative to printing of record.
40. This praecipe.

Dated at Seward, Alaska, this 27th day of January, 1936.

L. V. RAY,

Of Attorneys for Plaintiffs.

Service of the foregoing praecipe, by receipt of copy thereof, acknowledged this 28th day of January, 1936.

THOMAS M. DONOHOE,

Attorney for Defendants,

In Cause No. S-356.

[Endorsed]: Filed Jan 28 1936. [189]

[Title of Court and Cause.]

ORDER EXTENDING TIME.

This matter coming on on the application of the plaintiffs requesting thirty days' additional time to prepare and file the record on appeal in the above entitled cause and the court being fully advised;

IT IS HEREBY ORDERED that the plaintiffs have thirty days additional to prepare and file the record and bill of exceptions in the above entitled

cause and the plaintiffs are given said additional thirty days.

Ordered this 24th day of February 1936.

SIMON HELLENTHAL,

District Judge.

Entered Court Journal No. V-18, Page No. 140,
Feb 24 1936.

[Endorsed]: Filed Feb 24 1936. [190]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO TRANSCRIPT OF RECORD.

United States of America,
Territory of Alaska,
Third Division.—ss.

I, DERICK LANE, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 190 pages, numbered from 1 to 190, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the praecipe filed in my office on the 28th day of January, 1936; that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$43.40, has been paid to me by Agnes James, one of the appellants herein.

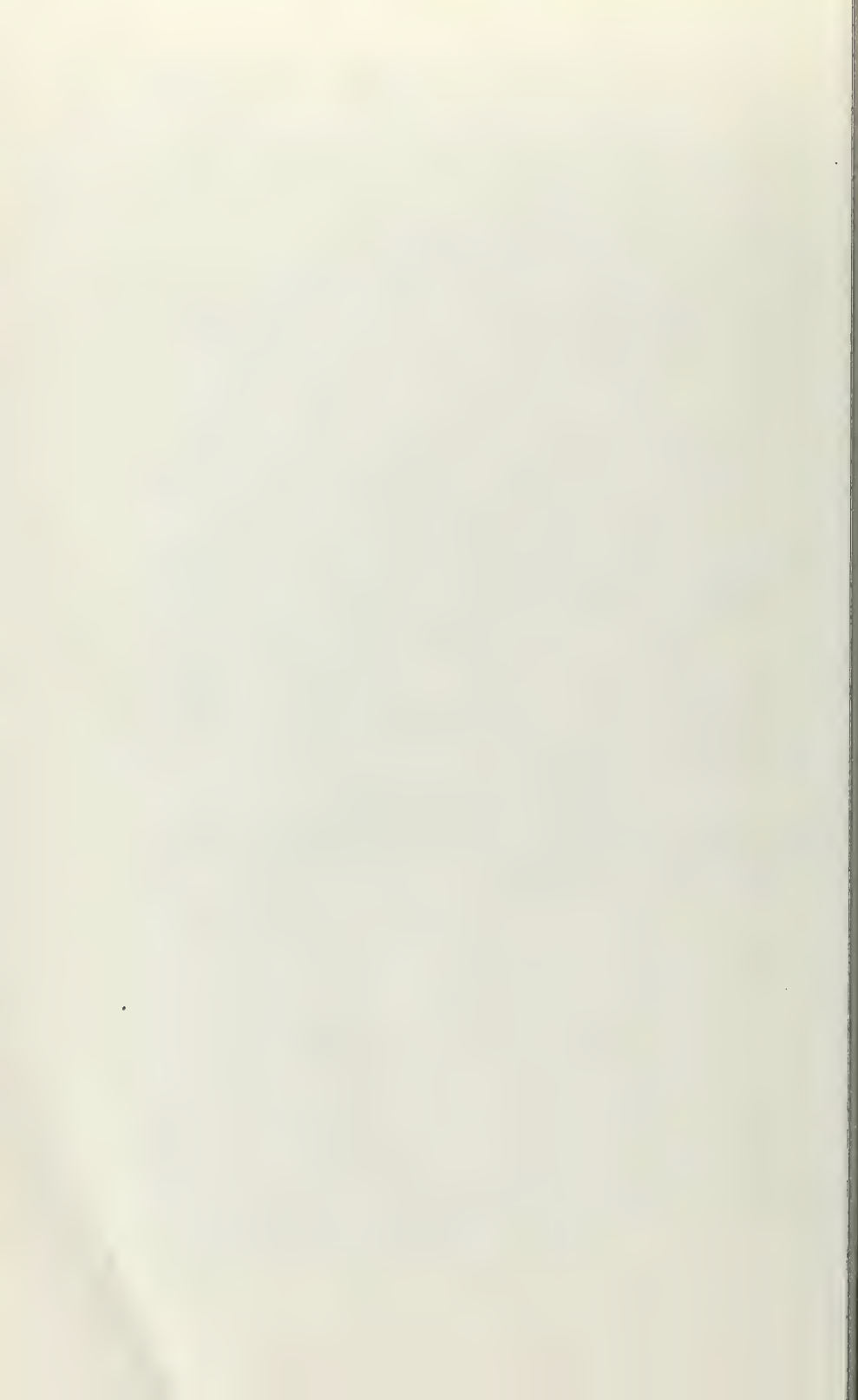
IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 5th day of March, 1936.

[Seal] DERICK LANE,
Clerk of the District Court, Territory of Alaska,
Third Division.

[Endorsed]: No. 8147. United States Circuit Court of Appeals for the Ninth Circuit. W. E. James and Agnes James, Appellants, vs. O. A. Nelson, as an individual, O. A. Nelson, as a trustee, N. P. Nelson, Charles Hawkins and Charles McMahan, Appellees. Transcript of Record Upon Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

Filed March 14, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.



In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit 6

No. 8147

W. E. JAMES and AGNES JAMES,
Appellants,

vs.

O. A. NELSON, as an Individual, O. A. NELSON,
as a Trustee, N. P. NELSON, CHARLES HAWK-
INS and CHARLES McMAHAN,
Appellees.

*Upon Appeal From the United States District Court
for the Territory of Alaska, Third Division*

Honorable Simon Hellenthal, Judge

BRIEF OF APPELLANTS **FILED**

J. C. WINTER,
Valdez, Alaska,
Attorney for Appellants

NOV 25 1911
PAUL P. O'BRIEN,
CLERK

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In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 8147

W. E. JAMES and AGNES JAMES,

Appellants,

vs.

O. A. NELSON, as an Individual, O. A. NELSON,
as a Trustee, N. P. NELSON, CHARLES HAWK-
INS and CHARLES McMAHAN,

Appellees.

*Upon Appeal From the United States District Court
for the Territory of Alaska, Third Division*

Honorable Simon Hellenthal, Judge

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This litigation was instituted April 27, 1934, by a complaint in equity, filed by W. E. James and Agnes James, his wife, as Plaintiffs, against O. A. Nelson, individually and as Trustee, N. P. Nelson, Charles Hawkins, and Charles McMahan, as Defend-

ants, based upon fraud and misrepresentation of the Defendant, O. A. Nelson, to set aside a so-called "Deed and Bill of Sale," certain leases, and for an accounting.

Prior to April 11, 1933, Appellants, by right of discovery and location and by performance of annual labor, were the owners of and entitled to the possession of the following described placer mining claims, subject to the paramount title of the United States of America:

"Those certain placer mining claims, situated upon Bonanza Creek, a tributary of Cathenda Creek; on Gold Run Creek, a tributary of Glacier Creek; on Cathenda Creek; and on Little Eldorado Creek, a tributary to Bonanza Creek; all of said claims being in the White River Mining District of the Chisana Recording District, Territory of Alaska, described as follows:

Discovery of Bonanza Creek;

No. 1 Above Discovery on Bonanza Creek;

No. 5 Above Discovery on Bonanza Creek.

No. 6 Above Discovery on Bonanza Creek;

No. 14 Above Discovery on Bonanza Creek;

No. 15 Above Discovery on Bonanza Creek;

Discovery Fraction on Bonanza Creek;

No. 5 Fraction Above Discovery on Bonanza Creek;

Discovery on Gold Run Creek;

Discovery Annex on Gold Run Creek;

No. 1 Cathenda Creek;

No. 1 Little Eldorado Creek;

No. 3 Little Eldorado Creek;

No. 1 Fraction Little Eldorado Creek;

No. 1 Gold Bug Bench on Little Eldorado Creek;

No. 2 Gold Bug Bench on Little Eldorado Creek;

No. 3 Gold Bug Bench on Little Eldorado Creek;

James Bench on Little Eldorado Creek."

On February 5, 1930, Appellants gave to the First Bank of Cordova a mortgage upon the above property to secure the payment of four promissory notes totaling \$5,150, which mortgage was unpaid, and suit for foreclosure was pending on April 11, 1933.

Appellants had also become indebted to the Chitina Cash Store of Chitina, Alaska, for goods purchased and monies advanced in the conduct of their mining operations. The Chitina Cash Store was an indorser upon certain of the promissory notes involved in the foreclosure suit. O. A. Nelson, one of the Appellees here, was at all times the owner of said store. Appellants were indebted to sundry other persons also.

On March 3, 1933, acting for the Bank and the Chitina Cash Store, Donohoe & Donohoe, attorneys, wrote Appellants as follows:

"They have authorized me to state that if you will give a conveyance of the property such as a deed so that they may have control of its opera-

tion, and may make such arrangements as they desire to realize some part of the money they have coming, they will apply all amounts received upon your indebtedness until it is liquidated, and then return the property to you."

On March 9, 1933, Appellants, in answer, requested that O. A. Nelson be sent to Chitina so "that we can make a deal along the line you mention in your letter, as I do not want to put anything in your way to delay paying them or the bank up."

O. A. Nelson came to Chisana. Negotiations were begun. Appellants refused to sign unless the Bank's indebtedness, the indebtedness to the Cash Store, and all their other bills, were paid. Nelson was handed an itemized list of their creditors, and two of their creditors personally presented their bill to him. He offered to submit the proposition to the Bank. At that point, an instrument designated as a "Deed and Bill of Sale" was entered into between W. E. James and Agnes James, husband and wife, and O. A. Nelson, Trustee, covering the mining claims above described, which instrument is herein set out (Tr. 104), following:

"DEED AND BILL OF SALE

"This indenture, made this 11th day of April, 1933, between W. E. James and Agnes James, husband and wife, of Chisana, Alaska, the parties of the first part, and O. A. Nelson,

Trustee, of Chisana, Alaska, the party of the second part, witnesseth:

"The said parties of the first part, for and in consideration of the sum of \$1.00 and other good and valuable consideration by them received, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, the following described property:

"Placer mining claims, Discovery on Bonanza Creek, No. 1 above Discovery on Bonanza Creek, No. 5 above Discovery on Bonanza Creek, No. 6 above Discovery on Bonanza Creek, No. 14 above Discovery on Bonanza Creek, No. 15 above Discovery on Bonanza Creek, Discovery Fraction on Bonanza Creek, No. 5 Fraction above Discovery on Bonanza Creek, Discovery on Gold Run Creek, Discovery Annex on Gold Run Creek, No. 1 Cathenda Creek, No. 1 Little Eldorado Creek, No. 3 Little Eldorado Creek, Discovery Bench on Little Eldorado Creek, No. 1 Discovery Bench on Little Eldorado Creek, No. 2 Discovery Bench on Little Eldorado Creek, No. 3 Discovery Bench on Little Eldorado Creek; No. 1 Fraction on Little Eldorado Creek; No. 1 Gold Bug Bench on Little Eldorado Creek; No. 2 Gold Bug Bench on Little Eldorado Creek; No. 3 Gold Bug Bench on Little Eldorado Creek; and James Bench on Little Eldorado Creek; all situated on Gold Run and Bonanza Creeks and tributaries, in the White River Mining District of the Chitina Recording Precinct, Third Division, Territory of Alaska; and also together with a sawmill and cabin located near the postoffice in the town of Chitina, Alaska, and one large cabin located in the town of Chitina and known as the James Cabin; and also together with all houses, buildings, pipe, giants, flumes, tools, machinery and equipment of every kind and

nature upon the said mentioned properties, or any of them, or in any manner connected therewith.

“To have and to hold the same, together with the dips, angles, spurs, ores, minerals, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever.

“The said parties of the first part, their heirs, executors and administrators do by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs, executors and administrators, all and singular, the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances, unto the said party of the second part, his heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and forever defend.

“In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

“W. E. JAMES (Seal)

“AGNES JAMES (Seal)

“Signed, sealed and delivered in the presence of

“LUELLA JOHNSTON

“C. H. GILLAM.”

The instrument was not acknowledged, and the last named witness, C. H. Gillam, was not present at the time the instrument was signed. He signed later. (Tr. 106-114.)

Nelson left with the instrument. Still unsettled as to their agreement, he wrote Appellants April 13, 1933, stating (Tr. 90):

“The bank’s first proposal was that they held the ground in trust till the debts were paid and then return the ground to you, but any unexpired leases that the bank might give would hold until they expired. I understood that you preferred to give up all claim to the ground for all time with the understanding that you get the lease for a year on a plot of ground selected by yourself, 100 by 100 feet, on Bonanza Creek at the mouth of Little Eldorado, and also that the Bank of Cordova and the Chitina Cash Store would accept the bill of sale for the ground as full and final satisfaction for the amounts you owe the two institutions.

“I do not want any possibility for a misunderstanding and if this is the way you intended the matter to stand, I wish you would write a note on the bottom of this page to that effect and sign it. . . .”

On April 16, 1933, Appellants replied, saying (Tr. 92):

“I prefer to the proposition of your cleaning up all my indebtedness in First Bank of Cordova and Chitina Cash Store by deed for all time, re-turning me notes and receipts paid in full . . .”

But, in the meantime, while still appearing to seek a definite understanding and before the letter of April 16 had been received, O. A. Nelson caused the “Deed and Bill of Sale” to be recorded in Chitina Recording Precinct, Chitina, Alaska, with O. A. Nel-

son, himself, as Commissioner and Ex-Officio Recorder for the Chitina Recording Precinct, Third Division, Territory of Alaska.

No acknowledgement appeared on the instrument of record.

On April 17, 1933, O. A. Nelson, acting for himself and in his individual capacity, gave to N. P. Nelson, one of the Appellees herein, a purported Lease of certain mining claims covered by the "Deed and Bill of Sale," for a term to expire on October 1, 1942, providing as consideration therefor "that from the gold extracted from said property he will pay to the said first party (O. A. Nelson) as royalty ten (10%) per cent of the gross amount of gold . . ." (Tr. 127.)

The purported Lease from O. A. Nelson to N. P. Nelson was not acknowledged. (Tr. 130.)

At later dates, O. A. Nelson gave Leases to the Appellees, Charles Hawkins and Charles McMahan, which leases have expired or have been surrendered.

Not having heard from O. A. Nelson since April 13, 1933, Appellant James wrote him on May 16, 1933, asking for a copy of the "deed" made to the First Bank of Cordova, and asking that all notes and receipts in full from First Bank of Cordova and Chitina Cash Store be sent to him.

He received no reply. Appellants had no knowledge of the lease to N. P. Nelson, and heard no further word from O. A. Nelson until June 30, 1933, when O. A. Nelson wrote (Tr. 93):

“ * * * When I was down at Cordova about the first of May I took up the matter of your deed with Muller. I told him that you would prefer to make it an unconditional sale with nothing coming to you at any time in the future, and have the mortgage satisfied. But Muller (First Bank of Cordova) does not want to drop the mortgage unless the C. C. S. (Chitina Cash Store) will take over the proposition and assume the debt owing to the bank. We would do this if we were in a condition where we could, but at the present the matter will have to stand just as we agreed when I was in there. N. P. Nelson has a lease on part of the ground, and the royalty from his lease and any other leases will go to pay off the mortgages. When these are paid, then the royalties will go to you. Probably you have as good an idea as I have how long that will be. If we find later that we can afford to take up the indebtedness to the Bank, then we will have the mortgage satisfied and you will be relieved of all responsibility for the indebtedness. . . .”

On the same day as the letter was dated, O. A. Nelson came upon the mining property and conversed with Appellants. Appellant James objected that he was being doublecrossed. Nelson walked away without replying. It was evident from his letter that O. A. Nelson was trying to have his cake and eat it, too.

Appellants continued to occupy the mining claims and to hold possession of same and of the personal property. (Tr. 101, 113.) N. P. Nelson never worked the mining claims covered by his purported Lease during the year 1933, or until the Spring of 1934, after the present litigation was begun. (Tr. 112-118.) He worked upon claims of other parties above the James property, performing dead work, stating to James that he was a laborer for O. A. Nelson, and securing permission to use a cabin on the James property in which to live and another in which to store gasoline. (Tr. 113-119.)

Appellants became uneasy and suspicious because the deed had not been returned and because there was general talk that O. A. Nelson and N. P. Nelson were going to operate their property.

Obtaining no satisfaction from O. A. Nelson, James again wrote the Bank under date of September 15, 1933, asking "why all this was going on, why his deed had not been sent back" to him. (Tr. 94.)

The Bank answered (Tr. 95) that O. A. Nelson held the notes, and the mortgage had been assigned to him; and that Appellants would have to look to Nelson.

James immediately wrote Nelson, and, under date of October 12, 1933, Nelson answered, for the first

time disclosing himself in his true light, in part as follows (Tr. 96-97):

"The deed and bill of sale was an outright and complete transfer of title, but at the time we considered both the propositions of returning the property to you, if and when the indebtedness had been paid, and of making the transfer permanent. I have a signed statement from you in which you say that you prefer to make the sale permanent on condition that the mortgage be cancelled and the notes returned to you. you.

"I now hold the mortgage and notes and they are a valid lien against any property you have until they are satisfied or returned to you and discharged.

"N. P. Nelson has possession of all of this property and you are hereby authorized to turn over to him all of the property named and described in the bill of sale. I am sending him a copy of this letter with instructions to receive this property and to check up thoroughly on the same, which he is in a position to do, as he knows what was on the ground at the time the mortgage was made.

"As soon as I receive word from N. P. that you have turned over all of the property covered by the deed and bill of sale, and have vacated the ground completely, and have met all of the terms of the above named deed and bill of sale, then I will send you the notes named therein and will send you the mortgage with the endorsement that it has been fully satisfied. . . ."

Appellants replied on October 18, 1933, reiterating their original proposition and asserting that they did

not consider the deed valid, since their proposition was not accepted. (Tr. 99.) Shortly thereafter, O. A. Nelson wrote Appellants, ordering them off the property, and sent certain papers, purporting to be the canceled notes, to Appellants by N. P. Nelson, which they refused to accept (Tr. 100), and this litigation ensued.

By October of 1933, and prior to the time N. P. Nelson had performed any work on the claims covered by his purported lease, Appellants had posted notices of ownership and forbidding trespassing on all of the claims owned by them. (Tr. 112-118.)

After suit was brought in April, 1934, N. P. Nelson went upon the property covered by his purported lease, and extracted \$9,000 in gold recoveries therefrom. (Tr. 134.) He employed a crew of six men, and expended \$16,540. He was entirely without funds or property himself, and was unable to purchase the necessary supplies and equipment to mine the property. O. A. Nelson put up the money. (Tr. 141.)

According to the undisputed testimony of Appellants, the reasonable value of the mining property involved in the Deed and Bill of Sale was \$150,000. (Tr. 101.)

The Appellees, defending separately, denied fraud or misrepresentation, and affirmatively pleaded that at all times there was a clear understanding between the parties, and that Appellees, N. P. Nelson, Charles Hawkins and Charles McMahan, entered into possession of the ground with the full knowledge and consent of Appellants. (Tr. 37-46-57-65.)

* * * *

Following the testimony of all the litigating parties, oral argument and presentation of memoranda of authorities, the trial judge filed his written opinion, in which he ruled that there had been no meeting of minds between Appellants and the Appellee, O. A. Nelson, and the First Bank of Cordova; but that Appellants by their acts and conduct were estopped to deny the lease from O. A. Nelson to the Appellee, N. P. Nelson.

In conformity with this conclusion, the trial judge, after refusing proposed Findings of Fact and Conclusions of Law of Appellants (Tr. 147) and allowing exception thereto, on March 13, 1935, made and entered its Findings of Fact and Conclusions of Law and Decree, which adjudged as follows:

1. That the "Deed and Bill of Sale" from W. E. James and Agnes James, his wife, to O. A. Nelson, Trustee, be set aside, canceled and annulled.

2. That Appellants are estopped to deny the validity of the Lease from O. A. Nelson to N. P. Nelson.

3. That the rights under the N. P. Nelson lease henceforth shall accrue to Appellants.

4. That the leases given by O. A. Nelson to Charles Hawkins and Charles McMahan, the remaining Appellees herein, are of no further force and effect.

5. That no costs, attorney's fees or disbursements be recovered by any of the litigating parties. (Tr. 160.)

Thereafter, upon petition for rehearing and oral argument of attorneys for all parties, the trial judge on November 9, 1935, made his Supplemental and Final Decree, allowing Appellants and O. A. Nelson an exception, in which he adjudged:

1. That Appellee, N. P. Nelson, shall make and deliver a report in writing to Appellants showing the gross amount of gold extracted during each mining season for the term of the lease, and deliver duplicate receipts of all mint or smelter returns and receipts of banks evidencing the gold recoveries. (Tr. 183.)

Thereafter, on January 20, 1936, this appeal, being launched by notice of appeal filed with approved

cost bond, was allowed and approved by order of Court. (Tr. 199-203.)

* * * *

This appeal involves the question:

Can the doctrine of estoppel be invoked under the facts and circumstances of this case to deny Appellants the right to question the validity of the lease of April 17, 1933, given by O. A. Nelson to N. P. Nelson?

ASSIGNMENTS OF ERROR.

Appellants, on January 7, 1936, filed assignments of error (Tr. 195-196-197-198-199), as follows:

I. The Court erred in invoking the doctrine of estoppel against the Plaintiffs with reference to the lease given by Defendant O. A. Nelson to Defendant N. P. Nelson on April 17, 1933, upon the ground that the Plaintiffs did no acts, committed no fraud, made no representations, nor created no condition upon which the doctrine of estoppel could be lawfully predicated.

II. The Court erred in invoking the doctrine of estoppel against the plaintiffs with reference to the lease given by Defendant O. A. Nelson to Defendant N. P. Nelson on April 17, 1933, upon the ground that the essential elements of

estoppel were wholly lacking, as shown by the testimony of both the Plaintiffs and Defendants herein.

III. The Court erred in invoking the doctrine of estoppel against the Plaintiffs with reference to lease given by Defendant O. A. Nelson to Defendant N. P. Nelson on April 17, 1933, upon the ground that the same had not been pleaded by the Defendant N. P. Nelson, and he did not sustain the burden of proof with reference thereto.

IV. The Court erred in refusing to cancel and set aside the lease from Defendant O. A. Nelson to Defendant N. P. Nelson dated April 17, 1933, on the ground that the same was fictitious, the royalties grossly inadequate, the terms burdensome and contrary to public policy.

V. The Court erred in refusing to cancel and set aside the lease from Defendant O. A. Nelson to Defendant N. P. Nelson, dated April 17, 1933, on the ground that the same was unacknowledged, unwitnessed, unrecorded, and constituted a cloud upon the title of Plaintiffs.

VI. The Court erred in refusing to cancel and set aside the lease from Defendant O. A. Nelson to Defendant N. P. Nelson, dated April 17, 1933,

on the ground that the Deed and Bill of Sale from Plaintiffs to Defendant O. A. Nelson, as recorded, constitute no notice, constructive or otherwise, to Defendant N. P. Nelson, evidencing any right or authority on the part of Defendant O. A. Nelson to lease the property covered by said lease to Defendant N. P. Nelson dated April 17, 1933.

VII. The Court erred in refusing to grant the Plaintiffs an accounting from the Defendants, and each of them, as prayed for in their complaint, upon the ground that the Deed and Bill of Sale theretofore given to Defendant O. A. Nelson being void and set aside, all recoveries under such void lease became the property of Plaintiffs and they were immediately entitled to same.

VIII. The Court erred in finding that Defendant O. A. Nelson acted as trustee and agent for the Plaintiffs in making the lease to Defendant N. P. Nelson, the trial Court having already determined that the Deed and Bill of Sale, purporting to confer authority upon Defendant O. A. Nelson as trustee, was void and of no effect.

IX. The Court erred in its failure to make and adopt the Findings of Fact proposed by

Plaintiffs designated in respect to holding the said lease to the Defendant N. P. Nelson as invalid, and in respect that the Plaintiffs never authorized the execution and delivery of said purported lease and never ratified the same; and that prior to the time when the Defendant N. P. Nelson took possession of the property under said purported lease Plaintiffs had notices posted upon such property declaring Plaintiffs' ownership thereof, and warning trespassers to keep off, upon the ground that the evidence submitted will sustain no other conclusion.

X. The Court erred in failing to adopt and make of the proposed Conclusions of Law presented by Plaintiffs, the Second thereof, to the effect that the Plaintiffs are entitled to a decree canceling and setting aside a certain lease made and executed by Defendant O. A. Nelson as lessor to the Defendant N. P. Nelson as lessee, bearing date April 17, 1933, expiring October 1, 1942, covering certain mining claims and property described therein.

XI. The Court erred in making and rendering a supplemental and final decree in this cause on the 9th day of November, 1935, with respect to that certain part of said supplemental

and final decree wherein said decree determines that the Defendant O. A. Nelson acted as trustee and agent for the Plaintiffs in making a certain lease dated April 17, 1933, to the Defendant N. P. Nelson as lessee, and insofar as said decree holds that the Plaintiffs are estopped from denying the validity of such lease.

SPECIFICATIONS OF ERROR

I.

The Court erred in invoking the doctrine of estoppel against the Appellants, with reference to the Lease given by O. A. Nelson to N. P. Nelson dated April 17, 1933. (Tr. 195-196, Assignments I, II, III.)

II.

The Court erred in refusing to cancel and set aside the Lease from O. A. Nelson to N. P. Nelson dated April 17, 1933. (Tr. 196-197, Assignments IV, V, VI, VIII, XI.)

III.

The Court erred in refusing to grant to Appellants an accounting, as prayed for in their complaint. (Tr. 197, Assignment VII.)

IV.

The Court erred in refusing to adopt and make the proposed Findings of Fact and Conclusions of Law submitted by Appellants. (Tr. 198, Assignments IX, X.)

ARGUMENT

Examination of the Assignments of Error verifies the previous assertion that this appeal presents only one question—and that a mixed question law and fact. Unfortunately, its consideration is somewhat complicated by a dispute as to the facts.

For clarity and convenience, the question involved may be split in two:

First, What record notice, if any, was imparted to N. P. Nelson, the lessee, upon which the doctrine of estoppel can be invoked against Appellants?

Second, What acts or conduct, founded in fraud, misled the said N. P. Nelson to his damage, upon which the doctrine of estoppel can be invoked against Appellants?

THE LAW DOES NOT FAVOR ESTOPPELS.

It has been said that estoppel is the spirit extract of fraud, and that the doctrine upon which it rests fastens and feeds upon the element of fraud. It is clothed in wrongdoing, and carries the badge of overreaching. Because of its significance, estoppels are not favored, and should not be applied to any case where the facts do not clearly justify their application.

10 R. C. L., 688-690.

Sanford, etc., v. Com'r, etc., 35 Fed. (2d) 312.

Burlington v. Rockwell, 31 Fed. (2d) 27.

Holbrook, etc., v. Arkansas, etc., 42 Fed. (2d) 541.

Rockwell v. U. S., 39 Fed. (2d) 984.

Miller v. Hayman, 52 Fed. (2d) 188.

In re: *Bastanchury Corp.*, 66 Fed. (2d) 665.

Starrett Corp. v. Fifth Ave., etc., 1 Fed. Sup. 868.

Burlew v. Fidelity, etc., 64 Fed. (2d) 976.

(1) ESTOPPEL MUST BE PLEADED

The defense of estoppel must be pleaded. It is an affirmative defense, and the complainant is entitled to notice before trial.

In 10 R. C. L., 842, it is said:

"It has also been held that an estoppel *in pais* must be pleaded in equity but need not be pleaded at law. The general rule now obtaining, however, is that estoppels, to be available on the trial, must be specially pleaded where there has been an opportunity for so doing; and that if a party, who has an opportunity to plead an estoppel upon which he relies, fails to do so, and goes to issue on his opponent's pleading, he thereby waives the estoppel and puts the matter at large."

To like effect is the rule as laid down in 21 Corpus Juris, 1243, where we find:

"While there is some authority to the contrary, the weight of authority is that, where there is opportunity to do so, an estoppel by deed must be specially pleaded to be availed of; and this is also the rule in respect of estoppels by record."

Here, the Appellee, N. P. Nelson, had every opportunity upon which to base a plea of estoppel. Yet, not one word was pleaded, and not once in oral argument or the presentation of authorities was the question raised. There could not have been a waiver of the rule by the Appellants, for the defense had not been raised. It was actually raised for the first time by the judge himself when he rendered his decision.

(2) BURDEN OF PROOF IS UPON ONE ASSERTING ESTOPPEL

It is a well settled rule of evidence that the burden of proof is upon him who has the affirmative of the issue. The burden of proof is upon the party alleging and relying upon an estoppel to establish all the facts necessary to constitute it.

21 Corpus Juris, 1250-1251.

Anderson v. Missouri State, etc., 69 Fed, (2d) 794.

In 10 R. C. L., 845, it is said:

“The burden of proof rests on the party setting up an estoppel to show the grounds on which it rests, and, as a pleading in estoppel should be certain in every particular and leave nothing to mere inference or intendment, so the evidence to support it must be clear, precise, and unequivocal. So, where an estoppel *in pais* is sought to be established by evidence of the declarations and admissions of persons made long anterior to the trial, such evidence cannot be too carefully scrutinized by the court or jury. It has been declared to be the most dangerous species of evidence that can be admitted in a court of justice and most liable to abuse.”

The burden of proving that the Appellants had so acted and conducted themselves as to be estopped from denying the validity of the Lease, under the authorities, rested upon N. P. Nelson. Measured by the evidence, he neither accepted the burden, nor did he offer evidence to sustain it.

ESTOPPEL CANNOT BE INVOKED FROM THE RECORD

The deed and bill of sale given by Appellants to O. A. Nelson, Trustee, was the only evidence of title which O. A. Nelson had upon which to base the Lease given him April 17, 1933, to N. P. Nelson. That instrument contained no acknowledgement, and only one witness was present when it was signed.

The statutes of Alaska Territory pertinent thereto are as follows:

“Sec. 2818. Deeds executed in Territory; two witnesses; acknowledgement. Deeds executed within the Territory of lands or any interest in lands therein shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such; and the persons executing such deeds may acknowledge the execution thereof before any judge, clerk of the District Court, notary public, or commissioner within the Territory, and the officer taking such acknowledgement shall indorse thereon a certificate of acknowledgment thereof and the true date of making the same under his hand.”

“Sec. 2833. Deed proved may be read in evidence; recording. Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed by any of the officers before named may be read in evidence without further proof thereof, and shall be entitled to be recorded in the precinct in which the lands lie.”

Compiled Laws of Alaska, 1933.

Under the clear words of the Alaska statutes, the so-called deed and bill of sale given by the James' to O. A. Nelson was not entitled to record. Hence, it gave no constructive notice to N. P. Nelson, a subsequent purchaser of an interest therein.

The general rule is aptly stated in American Law Reports, Annotated, 19 A. L. R. 1974, as follows:

“Where an instrument is required by statute to be acknowledged before being admitted to record, and the acknowledgment is omitted or is so defective that the instrument is not entitled to record, if it is nevertheless admitted to record, the record is not constructive notice.”

So, also, is the rule laid down in 1 R. C. L. 263, Sec. 26, as follows:

“And inasmuch as the recording of an unacknowledged instrument is not provided for by the statutes in question, the mere fact that the instrument may have been copied in the book of records is deemed by the weight of authority not to operate as constructive notice of its existence to subsequent purchasers or to anyone else. The certificate of acknowledgment is a necessary part of the record, and its omission renders the registration of the instrument a nullity for the purpose of charging any one with constructive notice.”

Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304 (note).

Main v. Alexander, 9 Ark. 112; 47 Am. Dec. 732, 734.

Wolf v. Fogerty, 6 Cal. 224, 65 Am. Dec. 509.

Herndon v. Doe, 7 Ga. 432, 50 Am. Dec. 406 (note).

Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460.

Nordman v. Rau, 86 Kan. 19; 119 Pac. 351, 38 L. R. A. (N. S.) 400.

Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 538.

Hayden v. Moffatt, 74 Tex. 647, 12 S. W. 820, 15 A. S. R. 869.

To the same effect is the rule laid down in 1 Corpus Juris, 757, Sec. 19, as follows:

“Where the statute prescribed acknowledgment as a prerequisite to registration, the recording of an unacknowledged instrument will not confer the benefits enjoyed by a properly recorded instrument, and will not operate as constructive notice to any one. . . .”

To the same effect is the decision of the Court in *Troyer v. Munday*, 60 Fed. (2d) 818, as follows:

“The filing and recording of a mortgage is not constructive notice to a trustee in bankruptcy, unless there has been a substantial compliance with the requirements of the state statute as to acknowledgment.”

Upon this question, we are not without precedent laid down by your honorable body.

The case of *Eadie v. Chambers* (1909), 172 Fed. 73, 18 Ann. Cas. 1906, 24 L. R. A. (N. S.) 879, is an Alaska case, construing the territorial recording

statutes, and was decided by this Court. While the question involved was the validity of a deed attested by only one witness, the same principle as laid down with reference to other requirements of the recording statutes is involved. In this case, this Court held that the formalities of the statute must be followed to entitle the instrument to record, although such an instrument might be valid as between the parties themselves.

Applying the general rule in a case tried before your honorable body, *Alaska Exploration Co. v. Northern Mining & Trading Co.*, 152 Fed. 145, this Court further said:

“... in order for such a record to impart constructive notice to any one, it is essential that the instrument be entitled, under the law, to such recordation. 13 Cyc. 600; *Alabama Marble & S. Co. v. Chattanooga Marble & S. Co.* (Tenn Ch. App.), 37 S. W. 1009; *Edwards v. Thom*, 5 South. 707, 25 Fla. 222; *Keech v. Enriquez*, 10 South. 91, 28 Fla. 597.

“It is clear that the certified copy of the record of the recorder of the mining district offered in evidence by the plaintiff in error did not meet these statutory requirements, for it showed upon its face that the deed that was recorded was without acknowledgment or other proof of its execution, and without the signature of subscribing witnesses. It was therefore not entitled under the law to be recorded anywhere, and the mere transcription of the unauthorized paper in the record of the mining district was not constructive notice to any one.”

Hence, it is clear that the James deed to O. A. Nelson, not being acknowledged and not being properly witnessed, was not entitled to record, and the record made by this same O. A. Nelson, as Recorder, constituted no notice to N. P. Nelson of any right, title, or interest in O. A. Nelson to the mining property of Appellants.

If, however, under any supposition of facts, it might be claimed that said instrument gave any evidence of title upon which N. P. Nelson had a right to rely, the recital in the deed and bill of sale designating the grantee as "O. A. Nelson, trustee," was sufficiently limiting as to O. A. Nelson's ownership to put N. P. Nelson on guard in his dealings with him and to strip him of innocence and *bona fides* in his subsequent dealings with O. A. Nelson.

ESTOPPEL CANNOT BE INVOKED FROM THE ACTS AND CONDUCT OF APPELLANTS

To constitute an estoppel of the nature determined by the trial court, the elements of estoppel *in pais* must be present.

In Bigelow on Estoppel, at page 437, it is said:

"The following elements must be present in order to constitute an estoppel by conduct:

1. There must have been a representation or concealment of material facts.

"2. The representations must have been made with the knowledge of the facts.

"3. The party to whom it is made must have been ignorant of the truth of the matter.

"4. It must have been made with the intention that the other party would act upon it.

"5. The other party must have been induced to act upon it."

Continuing, Bigelow states that an estoppel of this nature is such as arises "from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself." Citations follow.

In Bouvier's Law Dictionary (Rawles 3rd Revision), Vol. 1, Estoppel by Matter *in Pais*, it is said:

"Equitable estoppel, or estoppel by conduct, is said to have its foundation in fraud, considered in its most general sense."

In 10 R. C. L. 688-690, we find the general rule as follows:

"Actual fraud will work an estoppel in almost every case, though it is not generally considered an essential element. So-called constructive fraud, however, is not only sufficient, but lies beneath every equitable estoppel; that is to say, the person estopped is considered as having by his admissions, declarations, or conduct, misled another to his prejudice, so that it would work a fraud to allow the true state of facts to be proved."

In Story's Equity, Vol. 1, 391, it is stated:

"In all this class of cases the doctrine proceeds upon the ground of constructive fraud or concealment or negligence so gross as to amount to constructive fraud."

In *Anfenson v. Banks*, 163 N. W. (Iowa) 608, the Court said:

"Generally speaking, an estoppel *in pais* is applicable only where the conduct or words of the party estopped are intended or are of such character that, under the circumstances shown, they will be presumed to have been intended to influence the other party to act thereon, and did in fact so influence him."

In *Garretson v. Association*, 13 Iowa 411, 61 N. W. 955, the Court said:

"The doctrine of estoppel *in pais* is based upon a fraudulent purpose or fraudulent result. If the element of fraud is wanting, there is no estoppel, as where both parties were equally cognizant of the facts, and the declarations or silence of the one party produced no change in the conduct of the other. There must be deception and change of conduct in consequence."

See also

Wishard v. McNeill, 85 Iowa 479, 52 N. W. 486.

Beechley v. Beechley, 134 Iowa 82, 108 N. W. 765.

In 16 Cyc. 782, we find

". . . They (estoppels) are entitled to a fair and liberal application like other equitable doctrines that are admitted to suppress fraud and promote honesty and fair dealing."

The doctrine of estoppel, when applied, should be only to the extent of protecting the party who has been misled against the loss actually occasioned thereby. (Page 784.)

Estoppel is based upon a wrong.

Sanford, etc., v. Com'r, etc., 35 Fed. (2d) 312.

In Re Steiners' Improved Dye Works, 44 Fed. (2d) 531.

To work an estoppel, acts and declarations need not be made with intent to mislead, it being sufficient if they were calculated to and did mislead.

Trumbull v. Kirschbraun, 67 Fed. (2d) 974.

U. S. v. San Francisco, etc., 69 Fed. (2d) 728.

Mahoning, etc., v. U. S., 3 Fed Supp. 622.

Daube v. U. S., 5 Fed. Supp. 769.

"Conduct or statements calculated to mislead a party, and which are acted on by him in good faith to his prejudice, can only be invoked as a basis of estoppel."

State of Oklahoma v. State of Texas, 268 U. S. 252.

Mere silence is not sufficient to constitute an estoppel. There must be such silence that the one invoking the doctrine did not have equal knowledge with the other who failed to speak.

Detroit v. Detroit, 6 Fed. (2d) 845.

Clark v. Fisher, 8 Fed. (2d) 588.

Where conditions are known to all parties, or both have the same means of ascertaining the truth, and where they are under duty to ascertain the truth, there can be no estoppel. Estoppel is available for protection only, and cannot be used as a weapon of assault.

Murphy v. Payne, 15 Fed. (2d) 570.

Essential elements of estoppel *in pais* are ignorance of the party claiming estoppel of the matter involved, silence concerning the matter, and duty to speak, action on the apparent situation, and resulting damage, if estoppel is denied.

California Prune & Apricot Growers v. El Reno, etc., 15 Fed. (2d) 839.

Turk v. Newark Fire Ins. Co., 4 Fed. (2d) 142, also 6 Fed. (2d) 533.

From a collection of all the authorities, the rule is laid down in 10 R. C. L. 692-694, as follows:

“Mere silence will not work an estoppel. There must be some other element connected with the transaction and the silence to prevent a person from asserting his rights or claim. . . .

“The silence must be under such circumstances that there are both a specific opportunity, and a real or apparent duty, to speak. . . . But to effect an estoppel by silence it must also appear that the person had a full knowledge of the facts and of his rights, that he had an intent to mislead, or at least a willingness that others should be deceived, and that the other party was

misled by his attitude. And where the foundation for a claimed estoppel is silence or omission to give notice of one's rights, the party relying thereon must not have had the means of knowing the true state of facts, as by reference to the public records. . . . ”

Continuing on page 697-698, we quote:

“The final element of an equitable estoppel is that the person claiming it must have been misled into such action that he will suffer injury if the estoppel is not declared. . . . the estoppel should be limited to what may be necessary to put the parties in the same relative position which they would have occupied if the predicate of the estoppel had never existed.”

In 16 Cyc. 759, it is said:

“The Court says that to make silence of the party operate as an estoppel, the circumstances must have been such as to render it his duty to speak. It is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence.

“Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his rights and fails to assert his title or right, he will be estopped afterward to assert it; but it must appear that it was his duty to speak, and that his silence or passive conduct misled the other to his prejudice.” (p. 761.)

To invoke the doctrine of estoppel, there must have been a waiver of the rights of the party against whom the doctrine is applied. To constitute a waiver of

one's rights there must be an intention to relinquish a known right.

Marsden v. Travelers, etc., 52 Fed. (2d) 75.

Oelbermann v. Toyo Kisen Kabushiki Kaisha,
3 Fed. (2d) 5.

Third Dec. Dig., Vol. 11, p. 1340.

Mere passive acquiescence does not generally raise estoppel.

Holbrook v. Arkansas, 42 Fed. (2d) 541.

Waiver involves clear, unequivocal and decisive acts of the party, or acts amounting to estoppel.

Victor, etc., v. Yates, 54 Fed. (2d) 1062.

Such intention to relinquish must be conveyed to the person who invokes the estoppel.

Oliver, etc., v. U. S., 20 Fed. (2d) 214.

An essential element of estoppel must be knowledge of one's own rights; otherwise acquiescence or assent are ineffective.

In re Lake Champlain, etc., 20 Fed. (2d) 425.

Dickerson v. Colgrove, 100 U. S. 578.

Equally essential is the necessity of showing damage. To create estoppel *in pais*, one party must have been induced to change his position to his detriment; and it can be asserted only by one acting to his prejudice on a false statement made by the person against whom the doctrine is invoked.

U. S. Shipping, etc., v. Galveston, 13 Fed. (2d) 607.

In re Lake Champlain, etc., 20 Fed. (2d) 425.

“It has been held, however, that while an owner who fails to object to the erection of improvements upon his land may be estopped to claim the improvements, the principle cannot be carried to the extent of estopping him to claim title to the land in an action at law.”

16 Cyc. 761.

From the foregoing well established rules, the necessary elements of estoppel may be summarized as follows:

There must have been a waiver of known rights; there must have been a silence when there was the duty to speak; there must have been fraud or constructive fraud; there must have been wrongdoing; there must have been concealment; there must have been knowledge on the part of the one and ignorance on the part of the other; there must have been an intent to induce the other party to act to his detriment; there must have been an intent to mislead; there must have been unequal knowledge or opportunity to know the facts; there must have been knowledge of his own rights on the part of the one against whom the doctrine is invoked; there must have been resultant injury or damage.

Measured by these well known principles, now let us examine the facts and circumstances surrounding the Appellants and N. P. Nelson with reference to the property involved in the lease given him by O. A. Nelson.

In making this examination, it appears proper to call attention to the very apparent confusion and inconsistency of the lower court's findings and conclusions. The court held that Appellants were estopped to deny the validity of the lease, and based his conclusion upon the following two inconsistent findings:

“VI. That thereupon the defendant N. P. Nelson entered into possession of the mining claims above described (in the lease) *with the full knowledge and consent of the plaintiffs herein*, and spent large amounts of money in bringing water to said claims and developing said claims, and ever since said date has been and now is in lawful and peaceful possession thereof.” (Tr. 170.)

“VII. That on the 30th day of June, 1933, the defendant O. A. Nelson, acting for himself and associates, notified the plaintiff W. E. James that he would not at that time be able to go on with the proposition in connection with which the deed had been given, *and left the matter open for further negotiations; that the terms of this agreement in connection with which said deed was given were never fully agreed upon between the parties, and later in the Fall of 1933 the arrangement was definitely rejected by the plaintiffs.*” (Tr. 171.)

Bearing in mind the well established rule that Appellants must have known their own rights to be estopped, how could they have had knowledge or given consent to N. P. Nelson, when as the lower court rightly decided, there was never an agreement between the parties establishing their rights, so that they, in turn, could have knowledge upon which to base a consent?

In Finding VII the Court held that in the Fall of 1933 the deal was definitely off. Up to that time, by the testimony of all parties, no money had been expended, no work had been done on the mining claims covered by the lease, and whatever money may have been expended on the claims above those of the Appellants was not the money of N. P. Nelson, but the money of O. A. Nelson, who perpetrated this fraud upon Appellants and who dealt with N. P. Nelson as his laborer and partner and not as a trustee for Appellants, but in his individual capacity and for his own selfish purposes.

In 16 Cyc. 761, the established rule of equity under such circumstances is as follows:

“If the owner, as soon as he is informed of the expenditures and improvements, protests against their continuance, and asserts his ownership to the property on which they are made, no estoppel arises.”

Bringing themselves within the rule to avoid an estoppel, the Appellants as soon as they were informed that the deal was definitely off, in the Fall of 1933, posted notices, locked up their cabins, and protested against the continued exercise of control of their property. They went further. They brought this suit against N. P. Nelson to set aside the lease. It was after all this was done that the work was begun and the money expended upon the leased property. Appellants remained in possession of the property. N. P. Nelson broke the lock off a cabin in an attempt to take possession. Surely no estoppel can arise from such possession. Surely no estoppel can arise from such flagrant, wilful refusal to acknowledge the rights of an owner of property. (Tr. 112-118.)

What facts or circumstances, if any, gave rise to an estoppel? It is our contention that there were none. None of the elements are here present in order to invoke an estoppel.

There was no misrepresentation, no concealment of facts. James lived openly upon the property. He openly exercised ownership of it. When N. P. Nelson came upon the property in July of 1933, he believed that his deal with O. A. Nelson was going through, and, therefore, permitted him the use of a couple of cabins on the property. It is an unwritten law of

Alaska that mining cabins are the common property of all miners who seek shelter there. James would, therefore, have permitted Nelson to occupy these cabins in any event, and nobody knew that better than N. P. Nelson, an old miner, himself.

There was no color of fraud on the part of Appellants. None was pleaded and none was proved. Not even a hint at wrongdoing appeared during the course of the three-day trial. James was trying to pay his debts. He entered into negotiations with that end in view. That he, in so doing, fell into the clutches of a designing creditor who engineered his nefarious schemes until he obtained personal control of his property was not within his contemplation until the situation got far beyond his control by the Fall of 1933. He immediately set about to recover his property.

N. P. Nelson was, by every implication, an invisible partner in this whole scheme to defraud James. He, at all times, through his close relationship and dealings with O. A. Nelson, was in a better position to know the truth than was James, the victim of their machinations. N. P. Nelson was, therefore, not ignorant of the truth of the whole deal; and having knowledge, he could not have been induced to act to his detriment. Besides, he had nothing to lose. He was broke when he came to Chisana. O. A. Nelson put up the money, and it was he who took out the

gold recoveries. N. P. Nelson was merely his tool. There is an old axiom of equity which requires that he who comes into equity must come with clean hands; and that he who seeks equity must do equity. N. P. Nelson falters at the bar. His hands are tainted with the same overreaching and fraud as that of his mentor.

Rather, the doctrine of estoppel against estoppel should be applied in this case. For, N. P. Nelson held this lease from April 17, 1933, to June 30, 1933, without James' knowledge; and during all that time, and up to the open break in negotiations with O. A. Nelson in the Fall, he never mentioned his leasehold interest to James, though they saw each other from time to time. He held himself out as a laborer. He at all times had the superior knowledge. It was he who misled Appellants, he who remained silent when he should have spoken, he who concealed from James the fact of the lease and who withheld the true relationship between him and O. A. Nelson. Upon such a state of facts, the law will invoke an estoppel against him who seeks estoppel.

21 Corpus Juris 1139.

Branson v. Wirth, 17 Wall. 32, 21 U. S. (L. Ed.) 566.

10 R. C. L. Perm. Sup. 2764.

10 R. C. L. 841.

At the expense of repetition, the Court's attention is directed to the case of *New York Life Insurance Company v. Reese*, 19 Fed. (2d) 781, in which the Court holds, in a well reasoned decision upon a state of facts very similar to the case at bar, that the elements of estoppel of one clothing another with apparent power of disposition are misrepresentation, ignorance of the truth, and absence of equal means of knowledge.

"The indisputable elements of estoppel of one clothing another with apparent title or power of disposition are:

"(1)—Intentional or careless misrepresentations of known material facts inconsistent with subsequent claim;

"(2)—Ignorance of the truth, and absence of equal means of knowledge of the party claiming estoppel;

"(3)—Action by him induced by the misrepresentation; and

"(4)—Injury to him, if the truth be proved."

Measured by these requirements, the elements of estoppel are wholly lacking. A review of the history of Appellants' dealings with O. A. Nelson and N. P. Nelson would serve no purpose. It has been plainly stated in the foregoing pages. Suffice it to say that James had no intent to misrepresent, there was no misrepresentation, and no charge of so doing has ever been raised against him; no damage was suffered by

N. P. Nelson as a result of any acts of Appellants, and the said N. P. Nelson at all times had superior knowledge or means of knowing the truth.

There remains a question to be disposed of, raised by Assignment of Error IV, the reasoning for which has been partially disposed of in the discussion of the doctrine of estoppel. Viewed by the circumstances surrounding the execution of the lease and the admissions of N. P. Nelson as to his status, it is plain to see that the lease itself was purely fictitious, and served the design of O. A. Nelson to place the James property quickly and effectively beyond his outward visible control until such time as he could mine out the gold and convert it to his own uses. If the lease has been bona fide, and for the purpose of getting recoveries sufficient to pay off the indebtedness to the Bank and the Chitina Cash Store, then the royalty of ten per cent gross was wholly inadequate to furnish sufficient returns to ever pay off the debt. The total debts involved in the negotiations amounted to about ten thousand dollars. (Tr. 123.) The lease being burdensome as to its terms on account of the inadequacy of the return, it should be set aside as contrary to public policy.

In Finding VII the Court found that there was no meeting of minds between the parties, and based up-

on that finding, it concluded (Tr. 173) that the Deed and Bill of Sale should be set aside and cancelled. At the same time, however, the Court concluded that O. A. Nelson acted as a trustee and agent for the Appellants in the execution of the lease to N. P. Nelson, made subsequently to the Deed. If the deed was void and of no effect, then the grantee could convey no estate under it, and, therefore, the Lease was void and of no effect. The Court's conclusions were inconsistent, and as such constituted reversible error.

CONCLUSION

From the foregoing discussion of the facts and the law, and based upon the apparent inconsistencies of the lower Court, this Court is asked to reverse the decree wherein it upholds the Lease from O. A. Nelson to N. P. Nelson, and that said Lease be set aside and held for naught; that Appellants be granted an accounting of all recoveries had under such void lease, that they be awarded their costs and disbursements and a reasonable attorneys' fee, and that they be granted such other and further relief as in equity and good conscience to which they may be entitled.

Respectfully submitted,

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Valdez, Alaska,
Attorney for Appellants.

In the United States
Circuit Court of Appeals

No. 8147

W. E. JAMES and
AGNES JAMES,
Appellants,

vs.

O. A. NELSON, as an Individual,
O. A. NELSON, as a Trustee,
N. P. NELSON, CHARLES
HAWKINS and CHARLES McMAHAN,
Appellees.

Upon Appeal from the United States District Court for
the Territory of Alaska, Third Division.
Honorable Simon Hellenthal, Judge.

FILED

Brief of Appellees

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In the United States Circuit Court of Appeals

No. 8147

**W. E. JAMES and
AGNES JAMES,**
Appellants,

vs.

**O. A. NELSON, as an Individual,
O. A. NELSON, as a Trustee,
N. P. NELSON, CHARLES
HAWKINS and CHARLES McMAHAN,**
Appellees.

Upon Appeal from the United States District Court for
the Territory of Alaska, Third Division.
Honorable Simon Hellenthal, Judge.

Brief of Appellees

FURTHER STATEMENT OF THE CASE

We are unable to accept the Statement of the Case as set out in the Brief of Appellants as being a correct statement of the facts involved and proved at the trial, nor is that statement sustained by the Findings of the Trial Court.

At the outset it is necessary that the Court have in

mind the distinction between O. A. Nelson, N. P. Nelson, and John S. M. Nelson, who by a coincidence happen to have the same surname.

Long prior to the series of events which gave rise to this litigation, Appellants became indebted to The First Bank of Cordova, and to secure this indebtedness gave to the bank several promissory notes totaling \$5,150, one for \$2,860 being endorsed by the Chitina Cash Store, owned by O. A. Nelson and John S. M. Nelson, since deceased; and in addition gave the bank a mortgage covering the mining claims involved in this action. They likewise became indebted to the Chitina Cash Store for merchandise and supplies in the amount of \$530.00 on open account and \$1,945.00 upon a promissory note.

During the month of January, 1932, The First Bank of Cordova commenced an action to foreclose its mortgage upon these mining claims, but before judgment was obtained a letter was written to Appellants on behalf of the Bank suggesting that some arrangement might be made whereby the Appellants should turn the property over to the Bank and the Chitina Cash Store and the latter would try to lease it and later return it to Appellants, after they were able to liquidate Appellants' indebtedness. (Tr. 87)

Appellants replied suggesting that O. A. Nelson be sent to Chisana. (Tr. 88)

In April, 1933, O. A. Nelson went to Chisana, taking with him a form of deed and bill of sale from Appellants

to himself, he being named therein as Trustee. It is the undisputed testimony of all of the parties that after his arrival Appellants did not desire to enter into the arrangement suggested whereby they were to eventually get back the ground, but on the contrary on April 11, 1933, executed and delivered the deed and bill of sale to O. A. Nelson as an outright and final transfer of the property for the satisfaction of the indebtedness due the Chitina Cash Store and The First Bank of Cordova, and the additional agreement that they were to receive a lease upon a small piece of the mining ground for the season of 1933. At the trial appellants claimed that certain of their other creditors were to be paid also by the Bank and the Chitina Cash Store, while appellees contended that this was not a part of the agreement. The execution and delivery of this deed and bill of sale to O. A. Nelson was not at issue in this case, having been alleged in the Complaint of Appellants and admitted and re-alleged by each of the Appellees in their separate answers. (Tr. 5, 20, 34, 43, 55)

After the execution and delivery of the Deed, O. A. Nelson returned to Chitina, Alaska, and entered into negotiations with Appellee N. P. Nelson regarding a lease for a part of the mining claims covered by the Deed.

Notwithstanding the deed, Appellee N. P. Nelson would not take the lease until further confirmation from Appellants.

O. A. Nelson wrote Appellant W. E. James on April 13th, as follows: (Tr 90)

“Copy for you to keep.

“April 13th, 1933.

“Mr. W. E. James,

“Chisana.

“My dear James:

“I was busy yesterday getting a line on things and I talked with Donohoe over the phone. He said it suited the bank all right for you to have the piece of ground at the South of Eldorado. I will not have time to make a lease to it this morning, and I do not know if Gillam will stop here again before he goes directly to Chisana with your stuff. If I have time I will make the lease and send it in with Gillam on this trip, but if I do not I will send it in by the next mail and you can go ahead with your plans, knowing that it is coming in.

“The bank’s first proposal was that they hold the ground in trust till the debts were paid and then return the ground to you, but any unexpired leases that the Bank might give would hold until they expired. I understand that you preferred to give up all claim to the ground for all time with the understanding that you get the lease for a year on a plot of ground selected by yourself 100 by 100 feet, on Bonanza Creek at the mouth of Little Eldorado, and also that the Bank of Cordova and the Chitina Cash Store would accept the bill of sale for the ground as full and final satisfaction for the amounts you owe the two institutions.

“I do not want any possibility for a misunderstanding and if this is the way you intended the matter to stand, I wish you would write a note on the bottom of this page to that effect and sign it. It will not be necessary for Mrs. James to sign this for it is simply for my information and whatever you say is what will hold.

"Please return this by Gillam this trip if you can.

"Very truly yours,

"O. A. NELSON."

He received the following reply dated April 16th from Appellant: (Tr. 92)

"Chisana, Alaska, April 16, 1933.

"Dear Mr. Nelson:

"In reply to the letter of the 13th, 1933. I prefer to the proposition of your cleaning up all of my indebtedness in First Bank of Cordova and Chitina Cash Store by deed for all time, returning me notes and receipts paid in full.

"I am to have the lease on the said mentioned ground to mine this summer or season, and to keep whatever gold I may recover from same; also the use of cabin on No. 6 Claim while mining same. I reserve my personal effects. Also giving a list of equipment that the deed covers, 1 sawmill, 35 h. p. boiler; 1 steam engine, 18 h. p., 1 log building situated at mill site, 1 planer, 1 cabin situated in town of Chisana, 1 cabin, log, situated on No. 1 Chathenda Creek, 1 frame cabin on 5, 1 frame cabin situated 6, 1 prospecting boiler on 1 above Discovery, 1 hydraulic plant.

"W. E. JAMES."

On April 17th, 1933, O. A. Nelson gave to N. P. Nelson a lease (Tr. 127) covering a portion of the mining claims.

The undisputed testimony regarding this is as follows: (Tr. 136)

"(Cross examination of Mr. O. A. Nelson)

"Q. So the letter was written to you on the 16th; you received it and you made out the lease on the 17th, and that all took place in that short time? Do you want the Court to understand that?

“A. I do. I didn’t make that lease out until after I got the letter back because N. P. Nelson wouldn’t accept the lease until he knew the ground was in the clear.”

Immediately thereafter N. P. Nelson went to Chisana and took possession of the ground covered by the lease and remained there during the whole of the mining season of 1933 (Tr. 139), with the knowledge and consent of the Appellants, prospecting the ground; shipping in a very large quantity of supplies (Tr. 118, 119); doing dead work; (Tr. 118) constructing a ditch line and a mile of flume (Tr. 118, 140). Appellants turned over to him cabins and other property (Tr. 119); discussed with third persons N. P. Nelson’s operations (Tr. 142, 143); and by their representations and conduct led N. P. Nelson to accept the lease; change his position to his great detriment in devoting the entire season to preparation for actual mining, doing dead work, bringing in supplies, etc., so much so that after being able to actually hydraulic in 1934 and recover \$9,000, he was still in the hole \$7,540.

The first time that Appellants made any objection to N. P. Nelson was in October, 1933.

In the meantime and on April 20th, 1933, O. A. Nelson had given to Appellants the lease on the tract of ground 100 feet by 100 feet, which they desired for the season of 1933 and they had accepted this lease and confined their operations to this property. (Tr. 109). In

contravention of their claim that during this whole period they claimed the ground as though not deeded, they had relocated some of it and caused others to do so. (Tr. 111, 112, 115) Mr. James testified that he considered that Mr. O. A. Nelson violated his agreement on October 12th. (Tr. 110) Other leases had been given by O. A. Nelson to others of the Appellees, but they had run out or been surrendered before the trial.

O. A. Nelson did not tender the cancelled notes and mortgage to Appellants until the fall of 1933, and Appellants refused to accept them at that time.

The trial court in its Findings held that the tender came too late and that the Deed should be cancelled, but that the Appellants were estopped to deny the validity of the lease to Appellee N. P. Nelson, its findings supporting the statement of the case as given here and as claimed by N. P. Nelson. (Tr. 166, 167, 170, 173, 174)

The claim made now as to a value of \$150,000 for the claims covered by the Deed is not sustained and is grossly exaggerated. Appellants only claimed \$50,000 in their complaint, (Tr. 11) and the evidence showed that the ground was nearly worked out, (Tr. 142); that Appellants did not have water to work the bench ground (Tr. 113); that they had been making only a bare living for some years (Tr. 101, 103), and had been unable to recover enough to make any payments on their indebtedness. (Tr. 87)

ARGUMENT

The Appellants in their brief have confined themselves to the question of estoppel as found by the trial court against their denying the validity of the lease held by Appellee N. P. Nelson, so this brief will be restricted to the same issue.

DISCUSSION OF LAW CITED BY APPELLANTS

The question of pleading will be considered subsequently in a separate section.

With reference to the argument set forth commencing with page 28 of Appellant's brief, under the heading "Estoppel Cannot Be Invoked From The Record," we concede that the law is as there set forth; namely, that the deed given by Appellants to O. A. Nelson, although in fact recorded was not entitled to record, as it was not acknowledged; but we respectfully urge that this question is of no importance in the present case because we are not dealing with a question of constructive notice. When they say this deed "constituted no notice to N. P. Nelson of any right, title, or interest in O. A. Nelson" they are mistaken as to the effect of the deed. It is not necessary that there be any "constructive" notice, as is recognized in all of the cases cited by them.

It cannot be seriously contended that the deed was not effective to pass title even though it could not be properly recorded until acknowledged thereafter or proven as provided by the **Compiled Laws of Alaska, 1933:**

“Sec. 2828. Proof of execution by witness. Proof of the execution of any conveyance may be made before any officer authorized to take acknowledgement of deeds, and shall be made by a subscribing witness thereto, * * * *

“Sec. 2833. Deed proved may be read in evidence; recording. Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed by any of the officers before named may be read in evidence without further proof thereof, and shall be entitled to be recorded in the precinct in which the lands lie.”

The execution and delivery of this deed were not in issue in the case, as its execution and delivery were alleged by Appellants and set out “in haec verba” by them in their complaint (Tr. 5, 20), and admitted and realleged by Appellees (Tr. 34, 43, 55). And, in fact, it did have two witnesses, as is apparent from an inspection of the Transcript of the Record and the testimony of Appellant. (Tr. 89)

Appellants insist that in any event because the word “Trustee” was used in the deed, N. P. Nelson should have been on guard. The simple answer to that is that N. P. Nelson, even when he saw the deed, refused to go ahead with the lease until the Appellants had confirmed it as an outright conveyance by their letter of April 16, 1933. (Tr. 92, 136)

We shall not attempt a detailed discussion of the cases cited by Appellants in other portions of their brief, for the reason that none of them, with the exception of **New York Life Insurance Company v. Reese**, 19

F. (2d) 781, have facts even remotely resembling the facts involved in the present case. The Court will note that the 8th C. C. A., in the **Reese case commencing at page 786**, reversed itself upon rehearing and held that the estoppel was good. The case is, in fact, authority in support of our contentions.

PLEADING ESTOPPEL

Estoppel was not raised for the first time by the judge of the trial court when he rendered his opinion. Acquiescence and estoppel were in fact the whole basis of the affirmative defense set up by Appellee N. P. Nelson in his answer. He alleged the execution and delivery of the deed from Appellants to O. A. Nelson; their subsequent confirmation to him of that deed thereafter; the execution and delivery of the lease from O. A. Nelson to himself; and that he entered into possession of the ground with the full knowledge and consent of the Appellants (Tr. 34, 35, 36, 37). Appellants did not move against this affirmative defense by motion in any manner nor did they demur thereto; evidence in support of the question of estoppel was introduced by Appellee without objection upon their part and they in turn, both upon cross examination and by direct testimony of their own witnesses, accepted the issue upon the trial of the case.

(a) Necessity of Pleading at All.

“However, it was well settled at common law

that an estoppel in pais need not be pleaded. See **Bigelow on Estoppel (4th Ed.)** p. 668, et seq., and references in the notes. It is settled in this state that an estoppel of record, though not pleaded, may be received as evidence of the fact in issue, and when received is conclusive. **Krekeler v. Ritter, 62 N. Y. 372.** A fortiori, an estoppel in pais, may be proved without being pleaded, and if proved is equally conclusive."

Feinberg v. Allen, 101 N. E. 893. (N. Y.)

Dreyfuss Dry Goods Co. v. Lines, 18 F (2d) 611.

(b) Not Necessary to Plead Specifically.

We are aware that some of the courts do not so hold that an estoppel can be put in issue by a general denial, but even in these courts it is a universal rule that it is not necessary to plead an estoppel in so many words.

"And, finally, it is said that estoppel is not pleaded. The facts are set out in the complaint, and the failure to allege that by reason thereof the defendants are estopped to assert title to the property in question as against the plaintiff is not fatal after trial. Equity is not governed by such technical rules. Where facts which entitle the plaintiff to the relief sought are set out in the complaint and sustained by the testimony, the relief will, after answer and trial, be granted, notwithstanding the complaint may lack some of the requisites of a technical pleading."

Carlyle v. Sloan, 75 P. 217. Ore.

City of Ironton, Ohio, v. Harrison Const. Co., 212 F. 353. C. C. A. 6th.

Johnson v. Schimpf, 239 P. 401. Calif.

Daniel v. Pappas, 220 P. 355. Okla.

Bank of Chelsea v. Elam, 30 P. (2d) 919. Okla.

Hirsch Rolling Mill Co. v. Milwaukee & Fox Valley Ry. Co. 161 N. W. 741. Wis.

Putnam v. Chase, 212 P. 365. Ore.

“It is not expressly alleged that appellant had actual knowledge of the facts; but the representations made by him were made under such circumstances that a knowledge of the truth is necessarily imputed to him. Nor is it expressly alleged that the representations were made with the intention that appellee should act upon them. But the property had been sold by appellant to appellee’s vendor, who was then in possession. This vendor had the apparent title and power of disposition, and had been clothed with these by appellant * * * *

Hufford v. Lewis, 64 N. E. 99. Ind.

(c) No Plea Necessary Where Issue Joined at Trial.

“We hold, however, that where, in a suit in equity as in this case, testimony as to facts, upon which an estoppel is contended for, is introduced, not only without objection but contentious testimony disputing such facts is produced on the other side, the contention for an estoppel may be made at the hearing without having been pleaded.”

Standard Sanitary Mfg. Co. v. Arrott, 135 F. 750, 756, C. C. A. 2d.

Horn v. Abts, 19 F. (2d) 350. C. C. A. 8th.

Grand Valley Water Users’ Ass’n v. Zumbrunn, 272 F. 943. C. C. A. 8th.

New York Life Ins. Co. v. Rees, 19 F. (2d) 781, 787. C. C. A. 8th. (Case cited by Appellants.)

Andrew v. Miller, 250 N. W. 711. Iowa.

Resetar v. Leonardi, 216 P. 71. Calif.

Hubbard v. Lee, 92 P. 744. Calif.

Beckjord v. Traeger, 39 P. (2d) 523. Calif.

TOO LATE TO RAISE ISSUE OF PLEADING

Entirely irrespective of whether or not the pleading in Appellee’s separate answer and affirmative defense was sufficient or not, it is a universal rule upheld by the Supreme Court and the 9th Circuit Court of Appeals that appellants were too late in raising the issue.

“The supreme court of the territory rightfully held that the defendant should have raised the question in the trial court, where ample power exists to correct and amend the pleadings, and, not having done so, but having gone to trial on the merits, the defendant was precluded from assigning error, for matters so waived.

“The doctrine on this subject is well expressed in the case of **Tyng v. Commercial Warehouse Co.**, 58 N. Y. 313: ‘No question appears to have been made during the trial in respect to the production of evidence founded on any notion of variance or insufficiency of allegation on the part of the plaintiff. Had any such objection been made it might have been obviated by amendment in some form or upon some terms under the ample powers of amendment conferred by the code of procedure. It would, therefore, be highly unjust, as well as unsupported by authority, to shut out from consideration the case, as proved, by reason of defects in the statements of the complainant. Indeed, it is difficult to conceive of a case in which, after trial and decision of the controversy, as appearing on the proofs, when no question has been made during the trial in respect to their relevancy under the pleadings, it would be the duty of a court, or within its rightful authority, to deprive the party of his recovery on the ground of incompleteness or imperfection of the pleadings.’ ”

Wasatch Mining Company v. Crescent Mining Company, 148 U. S. 293, 37 L. ed. 454, 458.

Norton v. Larney, 266 U. S. 511, 69 L. ed. 413

Twin City Fire Ins. Co. v. Stockmen’s Nat. Bank, 261 F. 470. C. C. A. 9th.

Martin v. Imbrie, 262, F. 44. C. C. A. 2d.

Pennsylvania R. Co. v. Burgerson, 296 F. 311, C. C. A. 3d.

New York Underwriters Fire Ins. Co. v. Malham & Co., 25 F. (2d) 415. C. C. A. 8th.

Schmidt v. United States, 63 F. (2d) 390. C. C. A. 8th.

Chickasha Cotton Oil Co. v. Roden, 66 F. (2d) 127 C. C. A. 10th.

Tucker v. Newton, 256 P. 440. Calif.

Kohler & Chase Co. v. Savage, 167 P. 789. Ore.

Even where the appellate court has no doubt that the answer or complaint was defective the issue cannot be raised.

Grant Brothers Construction Company v. United States, 232 U. S. 647, 58 L. ed. 776.

Huse v. United States, 222 U. S. 496, 56 L. ed. 285.

Lorenz Co. v. Gray, 298 P. 222. Ore.

Smellie v. Southern Pac. Co., 276 P. 338. Calif.

Fairley v. Falcon, 214 N. W. 538. Iowa.

FINDINGS OF TRIAL COURT

The trial court in this case sustained by its Findings, based upon the conflicting evidence introduced at the trial, the contention of Appellee N. P. Nelson that he took the lease of the mining ground because of the deed given by Appellants to O. A. Nelson, and because of their subsequent confirmation of this deed by letter dated April 16th, 1933; that he immediately entered into possession of the ground with their knowledge and consent; that Appellants by their acts and conduct consented to his changing his position to his damage and

detriment by doing a great deal of work and expending a large sum of money during the year 1933; and that Appellants were estopped to deny the validity of the lease to Appellee N. P. Nelson taken by him in good faith and acted upon by him without any knowledge or reason to believe that the deed might thereafter be set aside.

The Ninth Circuit Court of Appeals has repeatedly held that it will not disturb the findings of the trial court on conflicting testimony taken in open court except for manifest error.

**Pacific American Fisheries v. Hoof, 291 F. 306.
C. C. A. 9th.**

Gila Water Co. v. International Finance Corporation, et al. 13 F. (2d) 1. C. C. A. 9th.

Easton v. Brant, 19 F. (2d) 857. C. C. A. 9th.

Graff v. Town of Seward, Alaska, et al. 20 F. (2d) 816. C. C. A. 9th.

Appellants did not themselves claim that the deed was invalid until October 12th, 1933, at which time Appellee N. P. Nelson had been working under this lease and had been in possession of the mining claims for approximately six months—since April 17th, 1933. (Tr. 110)

THE LAW OF ESTOPPEL

We shall not attempt to discuss the facts, except incidentally, as they are set forth in the Statement of the Case (*supra*) but shall endeavor to give what we conceive the law to be in relation to those facts.

(a) **Generally:**

“The defenses referred to in the second question certified are likewise substantially identical, and allege in sufficient form and in effect that all the stockholders of the Wabash Company, including the plaintiff, had prior to the commencement of the action acquiesced in the transaction as averred in the defenses referred to in the first question certified. Acquiescence as a defense has, speaking generally, a dual nature. It may, upon one hand, rest upon the principle of ratification, and may be denominated implied ratification, or it may, upon the other hand, rest upon the principle of estoppel, and may be denominated equitable estoppel. The former principle underlies it when the conduct of a plaintiff, relating to the transaction or matter complained of by him, subsequent to the rise of it, justifies and supports the normal and reasonable conclusion that he, by his assent thereto or acquiescence therein, has accepted and adopted it. His ratification is implied through his acquiescence, instead of expressed by positive and distinct action or language. * * * * The latter principle underlies it when a plaintiff against whom it is invoked remained silent or inactive when there was the opportunity and the duty to speak or act.”

Pollitsz v. Wabash R. Co., 100 N. E. 721, 725. N. Y.

The Ninth Circuit Court of Appeals has established the rule which binds the Appellants in cases of this nature even though they may in fact have had no intention to mislead or may have been innocent of any intention of wrongdoing.

“Having allowed the defendant in error to act upon the understanding had by both parties, the plaintiff in error cannot now deny that understanding, to the loss or injury of the defendant in error.

* * * * 'The vital principle (of estoppel in pais) is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.' * * * * 'Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience.' * * * * 'Thus negligence becomes constructive fraud, although, strictly speaking, the actual intention to mislead or deceive may be wanting, and that party may be innocent, if innocence and negligence may be deemed compatible. In such cases the maxim is justly applied to him that, when one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and loss.' "

Pacific Mill & Mining Co. v. Leete, 94 F. 968 at 975. C. C. A. 9th.

(b) Alaska Cases.

Two mining cases from Alaska involving a similar state of facts to those in this case have heretofore been before the Court upon appeal, and in both of these cases the court has sustained the estoppel:

"After he had seen the option in the possession of the Ruhls, he purchased it, and paid \$1,460 therefor in cash. The appellant never at any time informed him that the option was given without consideration, and his first knowledge of that fact was obtained on the trial when the appellant so testified. It was then too late for the appellant to assert that there was no consideration for the option. If authority is needed upon a proposition so plainly founded on equitable principles, a case in point is **Stewart v. Metcalf, 68 Ill. 109**, in which it was held

that, in the absence of fraud, a party to a written contract will be estopped from averring anything against the deliberate recitals and admissions contained in the same, especially when it will prejudice and work injury to others who have acted in good faith upon the belief of the facts as stated in the contract.”

Hoogendorn v. Daniel, 178 F. 765, 767, C. C. A. 9th.

In the second case this court went considerably farther than the trial court did in our case because it upheld the lease which had been given after the action had actually been commenced to recover the interest in the mining claims, although the plaintiff in that suit had expressly assented to the granting of one of the leases he had not agreed to the other, but was estopped as he knew of it and made no objection.

Cascaden v. Dunbar, 191 F. 471. C. C. A. 9th.

(c) Estoppel by Deed.

In this case Appellants gave a deed to O. A. Nelson covering the mining claims and confirmed it by their letter of April 16, 1933, and on the strength of this, N. P. Nelson took the lease in question upon this appeal. The rule is well settled that Appellants cannot deny the effect of the deed.

The Supreme Court in a recent case held that where the holder of a certificate of title entrusted it to another, who in turn presented it, together with a forged conveyance to himself, to the registrar and thereupon ob-

tained a new certificate of title and afterwards the land was bought by a third party in good faith, such original owner was estopped and must bear the loss.

“There are few constitutional rights that may not be waived. * * * * ” As between two innocent persons, one of whom must suffer the consequence of a breach of trust, the one who made it possible by his act of confidence must bear the loss.”

Eliason v. Wilborn, 281 U. S. 457, 74 L. ed. 962, 967.

A deed executed and delivered is conclusive as to the intention of the grantor to convey the property.

Mascarel v. Mascarel's Ex'rs., 86 P. 617, Calif.

Hart v. Anaconda Copper Mining Co., 222 P. 419. Mont.

Rocky Cliff Coal Mining Co. v. Kitchen, 222 P. 658. N. M.

The Supreme Court of Oklahoma quotes with approval the following:

“**Caspersz**, in his work on **Estoppel and Res Judicata** (3d Ed.) pp 282, 283, says:

‘Deeds are called solemn instruments. * * * *
It is right to suppose that what is stated in deeds, and other similar documents, represent the true state of things, and, consequently, parties should not be allowed afterwards to question the truth of what has been deliberately stated. * * * * Under these circumstances it appears to us that justice, equity, and good conscience require no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been in-

duced to alter his position on the faith of the instrument.'

"The doctrine of acquiescence may be stated thus: 'If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as to really induce the person committing the act, and who might otherwise have abstained from it, to believe he assents to its being committed, he cannot afterwards be heard to complain of the act, * * * * and it is no more than an instance of the law of estoppel by words or conduct..' **Caspersz, Modern Estoppel and Res Judicata (3d Ed.) p. 67.**"

Nickel v. Janda, 242 P. 264, 266, 267. Okla.

(d) Clothing Another with Apparent Title.

The courts have universally held that where the owner of real property has clothed another with apparent title he is estopped to set up his title where others have acted upon such apparent title, even where he acted in good faith at the time and without any intent to defraud.

Macaulay v. Dorian, 147 N. E. 793. Ill.

Whalen v. Schneider, 118 N. E. 41. Ill.

Mills v. Rossiter, 103 P. 896. Calif.

Westerman v. Corder, 119 P. 868. Kan.

Carruthers v. Whitney, 105 P. 831. Wash.

Bush v. Roberts, 110 P. 790. Ore.

Beno v. Norris, 151 P. 731. Ore.

Kime v. Krenek, 143 N. W. 473. Neb.

Loughran v. Gorman, 99 N. E. 886. Ill.

Schweiter v. Hooker, 162 P. 981. Wash.

Helwig v. Fogelsong, 148 N. W. 990. Iowa.

The same rule has been applied even where there was a crime committed by the one who had apparent title.

Baillarge v. Clark, 79 P. 268. Calif.

Quick v. Milligan, 9 N. E. 392. Ind.

United States Nat. Bank of Portland v. Holton, 195 P. 823. Ore.

Heckman v. Davis, 155 P. 1170. Okla.

Havel v. Costello, 175 N. W. 1001. Minn.

(e) Same Rule as to Personal Property.

National Safe Deposit, Savings & Trust Company v. Hibbs, 229 U. S. 391, 57 L. ed. 1241.

MacAndrews & Forbes Co. v. U. S., 23 F. (2d) 667. C. C. A. 3d.

Emmett Irr. Dist. v. Thompson, 253 F. 316. C. C. A. 9th.

Crowder v. Yovovich, 164 P. 576. Ore.

Carter v. Rowley, 211 P. 267. Calif.

(f) Acquiescence.

It is our contention that N. P. Nelson was given possession by Appellants, that he entered with their full knowledge and consent and immediately started prospecting, getting in a large quantity of supplies and equipment, building a ditch and doing other dead work and that was sustained by the Trial Court. Under this condition Appellants were also estopped to deny the validity of his lease.

“The primary ground of the doctrine (estoppel) is, that it would be a fraud in a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted. ‘**Hill v. Ep-ley, 31 Pa. 334.** * * * * No one is permitted to keep silent when he should speak, and thereby mislead another to his injury. If one has a claim against an estate and does not disclose it, but stands by and suffers the estate sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser.’ ”

Gregg v. Von Phul, 68 U. S. 282, 17 L. ed. 536, 537.

First Federal Trust Co. v. First Nat. Bank of San Francisco, 297 F. 353. C. C. A. 9th.

Management & Investment Co. v. Zmunt, 59 F. (2d) 663. C. C. A. 6th.

Milligan v. Miller, 97 N. E. 1054. Ill.

Syster v. Hazzard, 229 P. 1110. Idaho.

(g) Mining Cases.

Where the owner of a mining claim put another in position to hold himself out as holder of an option to sell, and purchasers dealt with such other on the assumption, the owner cannot urge the agency of such other and his misconduct as ground for setting aside his deed to the purchasers, since one who makes it possible for a person to perpetrate a wrong on another must suffer the consequences.

Keyworth v. Nevada Packard Mines Co., 186 P. 1110. Nev.

Where the owner of an inchoate title to mining claims, with right to possession which was susceptible

to abandonment, permitted another to relocate and incur expenses in development work on such claims and remained silent although he had knowledge of the work, he was estopped to assert his possessory right to the claims.

Sharkey v. Candiani, 85 P. 219. Ore.

**Florence-Rae Copper Co. v. Iowa Mining Co.,
178 P. 462. Wash.**

Even though F was the owner and his title was of record where F gave to a corporation an option to purchase certain mines and mining property, and caused the company to post a notice that it was the owner and F knew of this notice and the miners and laborers were working upon the faith of the notice and under the belief that they could have a lien, held F was estopped.

**Eastwood v. Standard Mines & Milling Co., 81
P. 382. Idaho.**

(h) Loss Between Two Innocent Parties.

Even if we admit for the purpose of this argument only that O. A. Nelson took the deed from the Appellants in bad faith (and we submit that such is not the fact and is not shown by the testimony) still Appellants are estopped as to the N. P. Nelson lease because of the equitable rule that where one of two innocent persons must suffer the loss occasioned by the wrongdoing of a third, the one who by his negligence or inadvertence has placed it in the power of the wrongdoer to perpetrate the wrong, which could not otherwise have

been done, must suffer the loss, rather than the other innocent party.

National Safe Deposit, Savings & Trust Company v. Hibbs, 229 U. S. 391, 57 L. ed. 1241. (Supra.)

Bridges v. Hurlburt, 178 P. 793. Ore.

This rule is cited with approval in a great many of the cases previously given with reference to other points of law.

It is intimated in the brief of Appellants that N. P. Nelson was a party to a great conspiracy to defraud Appellants and was not acting in good faith, but no evidence of this was, or can be, pointed out by Appellants. It is admitted that he obtained credit for supplies and freight from the Chitina Cash Store owned by O. A. Nelson, (Tr. 141), but there was certainly nothing wrong in this. Appellants themselves had been doing the same thing for years.

And, as far as that goes, the history of this whole case discloses that there never was any idea on the part of anyone, O. A. Nelson included, to defraud Appellants. On the contrary, the record will disclose that instead of O. A. Nelson being "a designing creditor who engineered his nefarious schemes," the creditors were actuated by a desire to save some equity out of the property for Appellants. They could have gone ahead and foreclosed the mortgage, but voluntarily made the offer to Appellants to work out a plan whereby Appel-

lants would eventually get the property back. Appellants, instead, on their own proposition (Tr. 106) voluntarily gave an outright deed under which N. P. Nelson took the lease in question. We submit that this case fairly comes under the following rule:

“No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation.”

**Illinois Trust & Savings Bank v. City of
Arkansas City, 76 F. 271, 293. C. C. A. 8th.**

LEASE ROYALTY

With regard to the adequacy of the royalty of 10 per cent gross raised by Appellants in their brief at page 41, we desire to point out to the Court that they did not in their Complaint or Reply allege that it was inadequate nor is there one statement anywhere in the evidence in this case that such a royalty was inadequate or unfair, nor did they attempt to point out any such evidence. The amount of royalty in a mining lease is subject to many conditions that vary from district to district, such as the character of the ground to be worked, its value, whether it is proven or not, the cost of mining, the amount of dead work to be done, etc., that it is impossible to say that such and such a royalty is inadequate as a matter of law. The royalty is 10 per cent gross in

the present lease was in fact a fair royalty and was so considered by the Trial Court.

CONCLUSION

In conclusion we desire to call the attention of the Court again that the case is even stronger when dealing with mining claims than with other types of property, and this can be best said by quoting from the Supreme Court in the case of **Johnston v. Standard Mining Company**, 148 U. S. 360, 37 L. ed. 480 at 486, in which it is said:

“While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with respect to the title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. * * * *

“The duty of inquiry was all the more preemptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. * * * * Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff’s rights. * * * *

“The language of Mr. Justice Miller in **Twin Lick Oil Co. v. Marbury**, 91 U. S. 587, 592, with regard to the fluctuating value of oil wells, is equally applicable to mining lodes: ‘Property worth thousands today is worth nothing tomorrow; and that which today would sell for a thousand dollars at its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.’ ”

We respectfully suggest, therefore, that there was ample reason, both upon the law and the facts, for the Trial Court to hold that Appellants were estopped to deny the validity of the lease given to Appellee N. P. Nelson by Appellee O. A. Nelson, and that the judgment should be affirmed.

Respectfully submitted,

DONOHOE & DONOHOE,

Thomas M. Donohoe,

Cordova, Alaska,

Attorneys for Appellees.

cut to size

In the United States
Circuit Court of Appeals
For the Ninth Circuit. 8

IN-A-FLOOR SAFE CO., LTD., a corporation,
Appellant,

vs.

DIEBOLD SAFE & LOCK COMPANY, a corporation,
Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

FILED

MAY 29 1936

PAUL P. O'BRIEN,

CLERK

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

* * * * *

DIEBOLD SAFE & LOCK)	
COMPANY, a corporation,)	
)
Plaintiff,)	
vs.)	IN EQUITY NO. 478-C
)
IN-A-FLOOR SAFE CO.,)	
LTD., a corporation,)	
)
Defendant.)	

CITATION ON APPEAL

United States of America—ss:

THE PRESIDENT OF THE UNITED STATES OF
AMERICA

to DIEBOLD SAFE & LOCK COMPANY, a corpora-
tion; GREETING:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear in the United States Circuit
Court of Appeals for the Ninth Circuit in the City of
San Francisco, California, thirty (30) days from and
after the date this citation bears, pursuant to Order allow-
ing Appeal filed in the Clerk's Office of the District Court
of the United States for the Southern District of Cali-
fornia, Central Division, wherein In-a-Floor Safe Co.,

Ltd., a corporation, is defendant and you are plaintiff, to show cause, if any there be, why the Order rendered against the said Appellant as in said Order allowing Appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable Wm. P. James, Judge of the District Court of the United States, for the Southern District of California, this 9 day of April A. D. 1936.

Wm. P. James

Judge of the District Court of the United States, for the Southern District of California.

Received a copy of the foregoing citation this 9 day of April, 1936.

DIEBOLD SAFE & LOCK COMPANY

By Lyon & Lyon

Its Attorneys.

[Endorsed]: Filed Apr 9-1936 R. S. Zimmerman,
Clerk By Robert P. Simpson, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF
CALIFORNIA CENTRAL
DIVISION

DIEBOLD SAFE & LOCK)		
COMPANY, a corporation,)		
)	
Plaintiff,)		Equity No. 478-C
vs.)		
	)	U. S. Letters Patent
IN-A-FLOOR SAFE CO.,)		No. 1,965,296.
LTD., a corporation,)		
)	
Defendant.)		

TO THE JUDGES OF SAID COURT, IN CHAN-
CERY SITTING:

Plaintiff, Diebold Safe & Lock Company, brings this its Bill of Complaint against defendant, In-A-Floor Safe Co., Ltd., and alleges:

I.

Plaintiff is a corporation organized and existing under the laws of the State of Ohio, having a place of business in Canton, Ohio, and is a citizen and inhabitant of said State of Ohio. Defendant is a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the city of Los Angeles, California, and is committing acts of infringement of plaintiff's above-mentioned patent in Los Angeles,

California, in the district and division aforesaid, and elsewhere.

II.

This suit is based upon Letters Patent of the United States No. 1,965,296 granted to plaintiff July 3, 1934, upon an application of William C. Miller filed in the United States Patent Office January 28, 1931, and the suit is brought under the patent laws of the United States.

III.

Prior to January 28, 1931, William C. Miller, a citizen of the United States residing in Canton, Ohio, was the first, original and sole inventor of a safe, or money-chest, and, on the date mentioned, he applied to the Commissioner of Patents in due form of law for United States Letters Patent thereon, which application was, by instrument in writing, executed by said William C. Miller and duly recorded in the United States Patent Office, assigned and transferred unto plaintiff, Diebold Safe & Lock Company; and such proceedings were had in the Patent Office on said application that on July 3, 1934, said Letters Patent 1,965,296 were issued to said Diebold Safe & Lock Company, in the name of the United States of America, in full compliance with the statutes in such case made and provided, whereby said Diebold Safe & Lock Company, its successors and assigns, was granted the exclusive right to make, use and vend said invention for seventeen years from the date of issuance of said patent throughout the

United States and the territories thereof. Said invention was new, useful, not known or used by others in this country before the invention thereof by said William C. Miller, not patented or described in any printed publication anywhere prior to the date of said invention, or more than two years before the filing of said application; not in public use or on sale for more than two years before the filing of said application, not patented in any foreign country by said William C. Miller or his legal representatives or assigns on an application filed more than one year before the filing of the application in this country, and not abandoned.

IV.

The money-chest set forth and claimed in said Miller patent constitutes a distinct advance in the art to which it pertains, and has been manufactured and marketed in large quantities in the United States by plaintiff. The invention has met with large demand by the public, and the public and manufacturing trade generally have recognized said Miller patent as a valid patent and acquiesced in the exclusive rights of plaintiff thereunder.

V.

Plaintiff is still the owner of said patent, never having parted with any interest therein or thereunder; and plaintiff is now entitled to sue for and recover for its own use all damages and profits arising out of or occasioned by infringement of said Letters Patent.

VI.

Since the grant of said Miller Patent 1,965,296, defendant has infringed said patent by making, using and selling, in the district and division aforesaid and elsewhere, safes embodying the invention disclosed in said patent and covered by the claims thereof. Defendant threatens to continue said infringement.

VII.

Plaintiff has marked the safes of its manufacture, covered by said Miller patent, with the patent number, in accordance with the provisions of the statutes; also, plaintiff has given to defendant actual notice of the infringement by defendant of said patent and warned the defendant to desist from such infringement, but defendant continues to infringe said patent.

VIII.

Plaintiff has been injured by and suffered damage as a result of the infringement aforesaid, which infringement was premeditated, wilful, and in defiance of plaintiff's rights; and defendant has made gains and profits therefrom, the extent whereof is unknown to plaintiff.

Plaintiff prays that:

- (1) Defendant, its agents and employees, be enjoined from further infringement of said patent;
- (2) Defendant account and pay to the plaintiff defendant's profits and plaintiff's damages resulting from

said infringement and a sum in excess thereof not exceeding three times the actual damages and profits:

(3) Defendant answer this bill, but not under oath (answer under oath being expressly waived);

(4) Plaintiff have such other and further relief as is proper;

(5) That a subpoena ad respondendum and writs of injunction, both pendente lite and perpetual, issue, directed to said In-A-Floor Safe Co., Ltd.

DIEBOLD SAFE & LOCK COMPANY

By Dyrenforth, Lee, Chritton & Wiles

Per J. H. Lee

Its Solicitors

2800 Board of Trade Bldg.,
Chicago, Illinois.

Of Counsel:

John H. Lee

Lyon & Lyon

Frederick S. Lyon

National City Bank Bldg.,

Los Angeles, California.

[Endorsed]: Filed Dec. 18, 1934 R. S. Zimmerman,
Clerk By L. Wayne Thomas, Deputy Clerk.

HAZARD & MILLER
CENTRAL BUILDING
CORNER SIXTH AND MAIN STS.
LOS ANGELES

FILED

MAY 12 1936

R. S. ZIMMERMAN, Clerk

By -----
Deputy Clerk

July 3, 1934.

W. C. MILLER

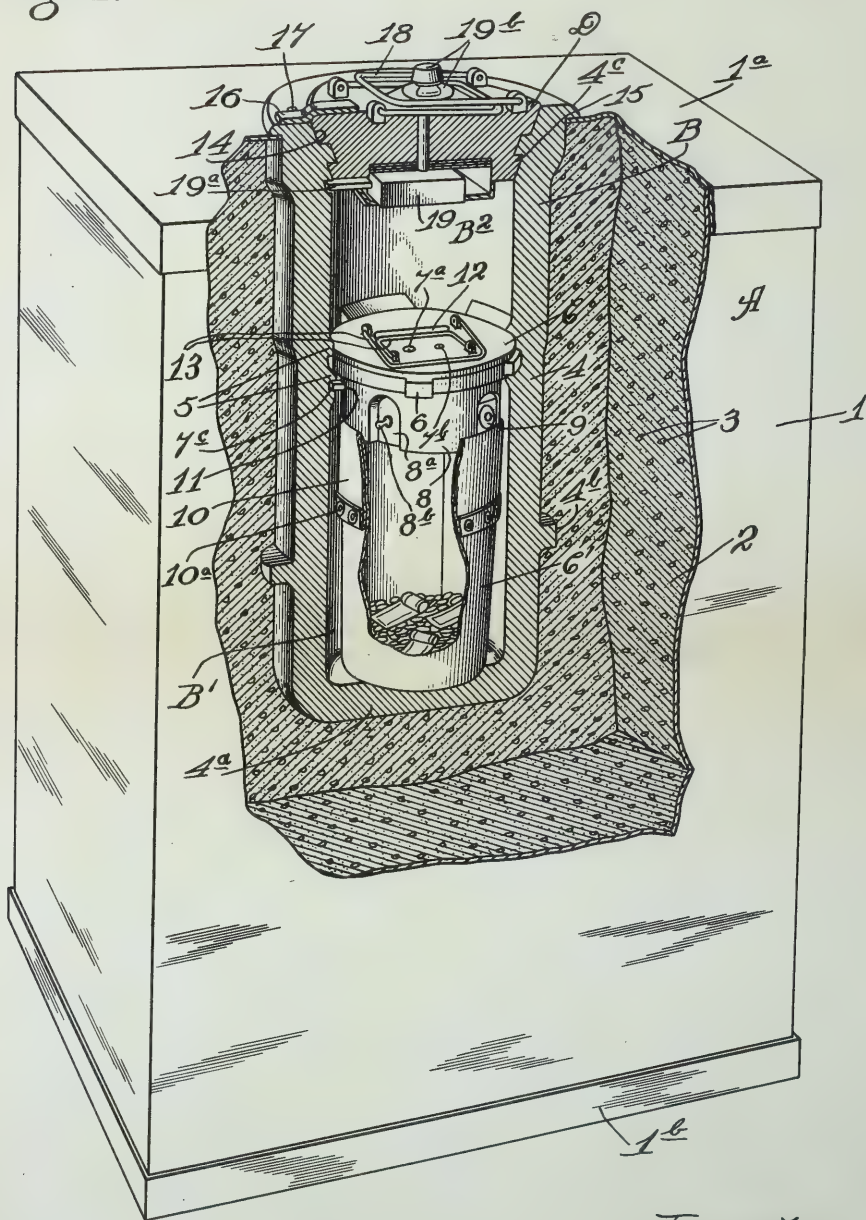
1,965,296

MONEY CHEST

Filed Jan. 28, 1931

3 Sheets-Sheet 1

Fig. 1.



Inventor.
William C. Miller.
By Dyunforth, Lee, Christian, & Wiles.
Attys.

July 3, 1934.

W. C. MILLER

1,965,296

MONEY CHEST

Filed Jan. 28, 1931

3 Sheets-Sheet 2

Fig. 2.

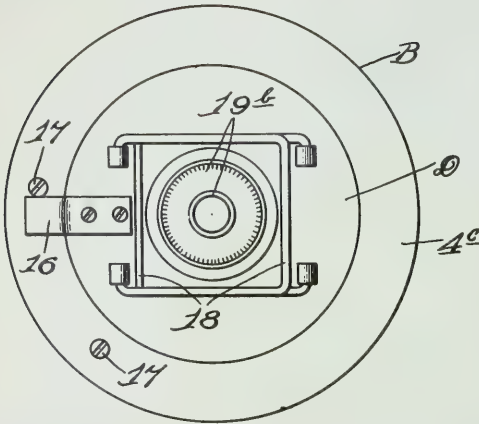


Fig. 3.

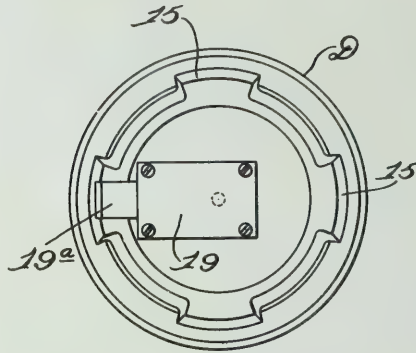


Fig. 4.

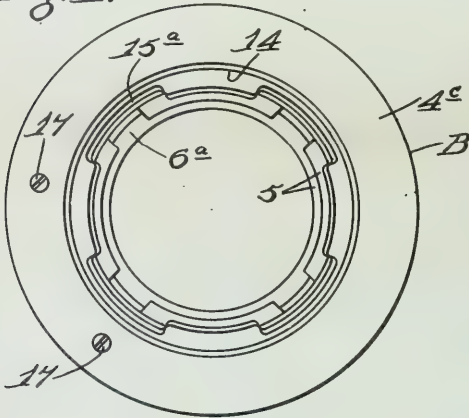


Fig. 5.

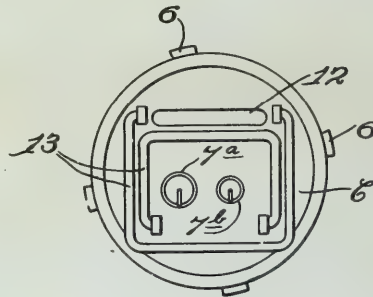


Fig. 6.

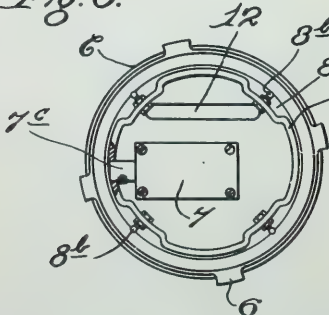


Fig. 7.

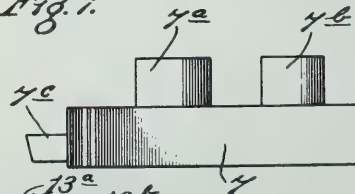
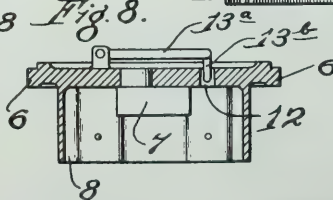


Fig. 8.



Inventor.

William C. Miller.

By Dyer, Smith, Lee, & Hilton, Attys.

MONEY CHEST

Filed Jan. 28, 1931

3 Sheets-Sheet 3

Fig. 10.

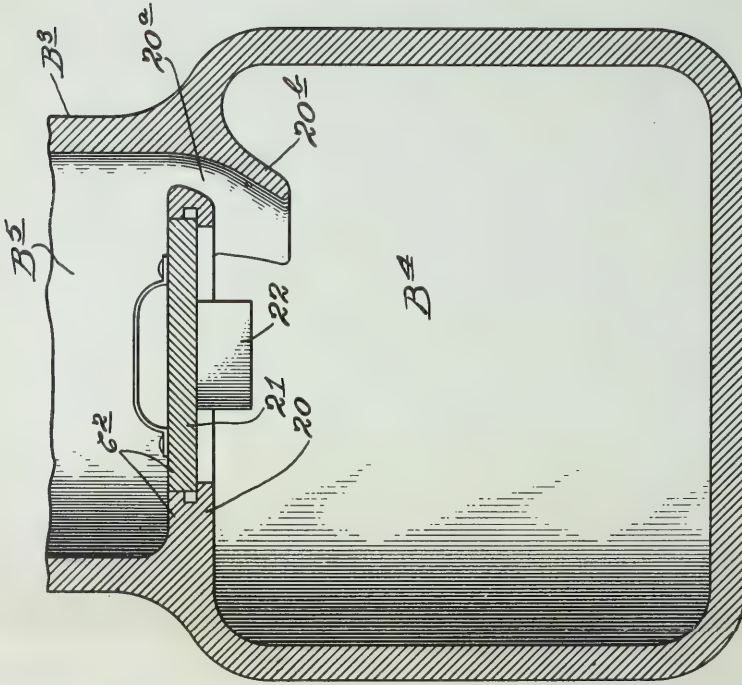
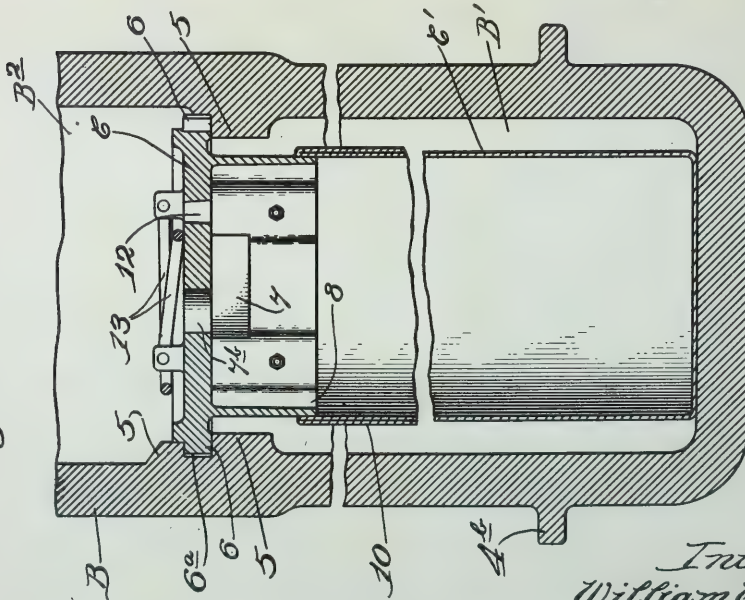


Fig. 9.



Inventor.
William C. Miller.
By Dyunforth, Lee, Christen, & Wils.
Attys.

UNITED STATES PATENT OFFICE

1,965,296

MONEY CHEST

William C. Miller, Canton, Ohio, assignor to The Diebold Safe & Lock Company, Canton, Ohio, a corporation of Ohio

Application January 28, 1931, Serial No. 511,893

11 Claims. (Cl. 109—1)

This invention relates particularly to chests adapted to safeguard the daily receipts of unit establishments, such as chain stores, gasoline filling stations, and the like.

5 The primary object is to provide a structure which is adapted to give protection to the change-cash which is required in operating a store, for example, and to give double protection to the bulk of the receipts, until they can be collected
10 and taken to a depository, or bank.

The invention comprises a safe-like structure which is provided with an inner compartment adapted to receive the bulk of the funds on hand, and an outer compartment disposed above the
15 closure of the inner compartment and adapted to hold such funds as may be needed for trading purposes during the day.

The closure of the inner compartment preferably is equipped with a dual-control lock, and
20 the closure of the upper or outer compartment is secured, either by a combination lock, or by a dual-control lock, as desired.

A money-passageway is provided between the upper chamber and the lower chamber, through
25 which money not needed for transacting the business of the store may be deposited within the lower chamber. Thus, a moderate amount of change-cash, \$25.00 to \$50.00, may be kept within the upper cash chamber, and excess funds above
30 the required amount may be deposited in the lower cash-chamber.

The invention is illustrated in a preferred embodiment in the accompanying drawings in which—

35 Figure 1 is a broken perspective view of a money chest embodying the invention, the structure being shown with the walls of the anchor-block partly broken away and the chest, proper, shown in section; Fig. 2, a plan view of the money chest, separate from the anchor-block; Fig. 3, an inner
40 view of the upper closure; Fig. 4, a plan view of the money chest, proper, with closures removed; Fig. 5, a plan view of the inner closure; Fig. 6, a bottom plan view of the inner closure; Fig. 7,
45 an enlarged elevational view of the lock with which the inner closure is equipped; Fig. 8, a sectional view showing a slight modification of the inner closure; Fig. 9, a broken vertical sectional
50 view, on an enlarged scale, of the money chest, proper; and Fig. 10, a similar sectional view showing a modification of the money chest, proper.

In the illustration given, A designates a thick walled anchor-block; and B, a vertically disposed money-chest imbedded and anchored in the
55 block A.

The block A preferably comprises a metal shell 1 filled with concrete 2 which may contain steel reinforcement 3.

The money chest B preferably comprises a cast-steel cylindrical casing 4 having an integrally
60 formed bottom 4^a and having an external anchoring flange 4^b.

The chest or container B depends through a large opening in the top 1^a of the external shell, and is provided at its upper end with an external
65 flange 4^c which overlaps the metal at the margin of the opening.

It will be understood that the container B may be placed in position, and the concrete may then be poured in the outer shell to firmly embed the
70 container in the concrete. This may be done by inverting the shell 1 and pouring in the concrete before the bottom 1^b of the shell is applied; or, if desired, a hole may be left in the bottom, through which the concrete may be poured. 75

The container B preferably is of cylindrical form. It is fitted with an inner closure C, and with an outer closure D, the outer closure being somewhat larger in diameter than the inner closure, so that the inner closure can be inserted and removed through the orifice at the upper end of the container, assuming the outer closure to be removed.

The inner closure preferably is fitted with a detachable bag C'. 85

As shown most clearly in Fig. 9, the closure C preferably is in the form of a heavy disc of metal, which may be cast steel, and is supported on an internal annular flange, or shoulder, 5. The member C is provided at its circumferential edge with integral locking lugs 6 which are adapted to engage bayonet-slots 6^a with which the flange 5 is provided. The closure is lowered to its seat, the lugs 6 enter the bayonet slots, and the closure is then rotated to bring the lugs under the
90 shoulders of the bayonet slots. The closure is equipped at its lower side with a dual-control lock 7 which is fitted (Fig. 7) with key barrels 7^a and 7^b which extend through perforations with which the closure is provided. The lock is also provided with a bolt 7^c adapted to be controlled by two different keys insertable through the key barrels 7^a and 7^b. Any suitable dual-control lock may be employed; or, if preferred, a combination lock may be employed in connection with the
105 inner closure.

The interior of the container B is divided by the partition wall which is composed of the annular shoulder 5 and the inner closure C into a lower surplus-cash chamber B' and an upper
110

change-cash chamber B². The inner closure is within easy hand-reach through the upper compartment, so that change-cash in the upper compartment is within easy reach, and the inner closure and attached money-bag likewise are readily removable by grasping with the hand the handle with which the inner closure is equipped.

Where, as in the preferred construction, the inner closure C is equipped with a money-bag C', the closure preferably is provided with an integrally formed depending cylindrical flange 8, with which the bag is detachably connected.

In the illustration given, the outer wall of the depending flange 8 is provided with recesses 8^a in which are located studs or buttons 8^b, which are securely fastened to the flange at the reduced portions thereof.

The bag C' which preferably is of heavy canvas, or leather, is equipped at its inner side, some distance from its open end, with tabs, or straps, which are provided with eyelets 9, which are adapted to snap over the buttons 8^b. The upper end portion of the bag, designated 10, is turned downwardly over the outer side of the bag, and is provided at its free margin with eyelets 10^a. A cord, or chain, (not shown) may be threaded through the eyelets 10^a and a seal applied when the collector calls to collect the surplus cash.

The bolt 7^c of the lock is adapted to be projected through a perforation 11 in the flange 8 and to enter a recess in the flange 5 of the solid wall of the container B, as shown in Fig. 1.

The closure C is provided with a money-slot 12 which extends from the upper cash-chamber B² through the closure, so that money can be deposited in the lower cash-chamber B', or in the bag C', if used.

Also, the closure C is equipped with pivotally connected U-shaped handles 13 which may be used to turn the closure (after it is unlocked) and effect removal of the closure from the container B. When the bag C' is used, it is, of course, lifted out of the container in the operation of removing the closure C from the container.

In the modification shown in Fig. 8, a single handle, designated 13^a, is connected to the upper surface of the closure C. The arms of the handle are pivotally connected to lugs with which the closure is equipped, and have extensions which provide shoulders which limit the upward swing of the handle, and serve to balance the device when the closure is to be withdrawn. The web portion of the handle is equipped with a pusher, or plunger, 13^b, which is adapted to extend through the money-slot 12, when the handle is lowered to a position parallel with the upper surface of the closure. This device may be used as a pusher to force currency through the slot.

If desired, suitable baffles (not shown) may be employed in connection with the money-slot to prevent the possibility of withdrawing money after it has been once inserted.

As will be understood from Figs. 1-4, the upper closure D preferably comprises a heavy disk of steel which is removably mounted in a frusto-conical seat 14 which is provided at the mouth of the container B.

The closure D may, for example, consist of 5-ply drill-proof chrome steel plate. As shown, the closure is equipped at the inner portion of its periphery with integral lugs 15 which are adapted to engage bayonet-slots 15^a with which the door seat 14 is provided. The closure may be placed in the seat 14 with the lugs 15 entered in the slots

15^a, and may then be rotated to bring the lugs beneath the shoulders of the bayonet-slots. The closure has secured thereto a bar or stop 16, which is adapted to engage either one of a pair of spaced studs 17 which project upwardly from the flange 4^c of the container. These members may be used to limit rotation after the lugs 15 have entered the bayonet-slots 15^a; or, if desired, one of the studs may be so set as to serve as a guide to indicate the proper position of the closure when it is to be placed in or removed from its seat.

The closure D is equipped at its outer side with pivoted U-shaped handles 18; and it is equipped at its inner side with a lock 19 provided with a bolt 19^a which engages a recess in a wall of the container B.

While the lock may be of any suitable construction, it is shown conventionally as a combination lock, or dial lock, the knob and dial being indicated at 19^b.

While the improved money-chest and the anchor block in which it is embedded may be of any desired size and weight, it is preferred to make the structure heavy, strong and reasonably fire-proof. Convenient dimensions for ordinary purposes are, for illustration, an inside diameter of about 7 inches for the cylinder B, with the other parts proportioned substantially as shown. A structure of this type having an anchor block about 31"x23"x18" ordinarily will weigh in the neighborhood of twelve to fifteen hundred pounds. It is desirable that the weight of the structure as a whole shall be great enough to prevent the structure from being carried away bodily. The money-chest proper, comprising the steel casing B and the closures therefor, may, if desired, be embedded in a concrete floor, in which event the upper end of the container B will be substantially flush with the floor.

In the modification shown in Fig. 10, B³ designates a steel-casting container having a lower excess-funds chamber B⁴ and an upper change-cash chamber B⁵. In this instance a partition-wall C² separates the upper chamber from the lower chamber. This wall comprises an internal integral flange 20 and a removable closure 21 equipped with a lock 22. The closure 21 may be applied and secured in the same manner as is the closure C shown in Fig. 9.

The flange 20 has a money-slot 20^a extending therethrough, and is provided with a protecting baffle 20^b. It will be noted that in this instance the money-slot which extends through the partition-wall C² passes through that portion of the wall which constitutes the flange 20, instead of passing through the closure 21.

It is to be understood that the container B³ may be embedded in a cement block, and may be equipped at its upper end with a closure similar to the closure D shown in Fig. 1.

The improved money-chest is reasonably fire-proof and capable of withstanding heavy blows, or severe usage, such as a fall, in the event of the giving away of the walls of a burning structure.

In the use of the improved deposit-safe in a chain-store system, for example, the change-fund required for operating the store may be kept in the upper compartment B². Thus, the change-fund may be kept locked up at night. If desired, a dual-control lock may be applied to the closure D, instead of a combination lock.

Ordinarily, the lower, inner closure C, will be kept locked in position during the day, and will serve as a bottom wall for the upper chamber

B². From time to time, during trading hours, excess funds above those required for carrying on trade, are deposited through the slot 12 into the lower compartment.

5 It may be assumed that the manager of the unit store will keep one key to the inner closure C, and that the collector will keep the other key to said closure. These keys must both be used at the same time to unlock the closure C, after
10 which the closure may be removed from the receptacle to give access to the lower compartment B¹.

If the bag C' is used, it will be lifted out of the container through the medium of the closure
15 C when the latter is lifted out. The bag may then be sealed up and taken by the collector to the central depository and the funds checked against a deposit slip inserted by the manager of the unit store before the sealing of the bag.

20 From the description given, it will be understood that in the event of a daylight holdup, the robbers will be unable to secure more than the change-fund. That is, they cannot gain access to the inner compartment, owing to the fact that
25 one key necessary to unlock the closure C will not be at hand.

Again, the change-fund is protected at night by the securely locked closure D; and if robbers were to attempt to secure the funds at night,
30 they would be obliged to open both the closure D and closure C. The time required to accomplish this would be so great as to probably frustrate the effort. If desired, the inner closure C may be equipped with a dead-lock bolt (not
35 shown) which will be "shot" in the event that robbers attempt to unlock the regular lock of the closure C. In use, the improved deposit-safe has proven to be thoroughly adapted to its purpose. It can be manufactured at such moderate
40 cost as to enable it to be used quite generally in every situation where it is needed.

The foregoing detailed description has been given for clearness of understanding only, and no unnecessary limitations should be understood
45 therefrom, but the appended claims should be construed as broadly as permissible, in view of the prior art.

What I regard as new, and desire to secure by Letters Patent, is:

50 1. A plural-compartment money-chest comprising: a heavy-walled container having a lower cash-compartment and an upper, superposed cash-compartment; a heavy-walled lock-equipped closure forming a top for said container;
55 a heavy-walled lock-equipped inner closure forming a top for said lower cash-compartment disposed within reach of hand through said upper compartment and liftable by hand and withdrawable through said upper compartment,
60 said closures being separated by a space forming said upper cash-compartment; and a money-passage forming a communication between said cash-compartments so constructed as to permit transfer of cash from the upper compartment
65 into the lower compartment and prevent re-transfer therethrough to the upper compartment.

2. A plural-compartment money-chest as specified in claim 1, in which said container is of integral construction and is provided with an
70 internal flange which forms a seat for said second-mentioned closure and has lugs which interlock with lugs carried by the closure when the latter is in locked position.

3. A plural-compartment money-chest as specified in claim 1, in which said money-passage

extends through said second-mentioned closure.

4. A plural-compartment money-chest as specified in claim 1, in which said container has an inner integral flange which forms a seat for said second-mentioned closure and said money-
80 passage extends through said flange.

5. A plural-compartment money-chest comprising: an upright integral cast-metal heavy-walled container having at its upper end an outer closure-seat of given size and at a short distance
85 below the same an inner closure-seat of smaller size; a heavy-walled lock-equipped inner closure secured in said inner closure-seat within hand-reach through the upper end of said container and dividing said container into a lower surplus-cash compartment and an upper change-cash compartment, said closures being spaced apart to provide said change-cash compartment and said inner closure being liftable by hand and withdrawable through the upper end of said container;
90 a lock-equipped heavy-walled outer closure secured in said outer closure-seat; and a money passage leading from said change-cash compartment to said surplus-cash compartment and so constructed as to permit deposit of money
100 through said change-cash compartment into said surplus-cash compartment and prevent withdrawal of the deposited money.

6. A plural-compartment money-chest as specified in claim 5, in which the closure-seats and the
105 closures mentioned are equipped with interlock-lugs which are in engagement when the closures are secured in position by the locks with which they are equipped.

7. A plural-compartment money-chest comprising: a heavy-walled integral cast-metal container having a lower cash-compartment and an upper relatively shallow superposed cash-compartment; a heavy-walled lock-equipped outer closure forming a top for said container; a lock-
115 equipped inner closure forming a top for said lower cash-compartment disposed within reach of hand through said upper compartment and liftable by hand and withdrawable through said upper compartment, said closures being separated
120 by a substantial space to provide said second-mentioned cash-compartment and said inner closure being equipped with a handle adapted to be grasped by hand to effect such removal; and a money-passage forming a communication between
125 said cash-compartments so constructed as to permit transfer of cash from the upper compartment into the lower compartment and prevent re-transfer therethrough to the upper compartment.

8. A structure as specified in claim 7, in which said inner closure is equipped at its upper surface with a handle which may be grasped by hand to effect removal of the closure and is equipped at
130 its lower side with a depending, detachable money-bag.

9. A plural-compartment money-chest comprising: a heavy-walled integral cylindrical container having a lower cash-compartment and an upper superposed cash-compartment which is relatively shallow; a heavy-walled lock-equipped closure forming a top for said container; a lock-
140 equipped inner closure forming a top for said lower cash-compartment which is disposed within hand-reach through said upper compartment and liftable by hand and withdrawable through said upper compartment, said closures being spaced apart a substantial distance to provide substantial depth for said upper cash-compartment; a detachable money-bag depending from said inner
150

closure and removably attached thereto, said money-bag being equipped with means for effecting sealing thereof after detachment of the bag from the closure, and a money-passage through said inner closure so constructed as to permit transfer of cash from the upper compartment through said inner closure into said money-bag and prevent re-transfer therethrough to the upper compartment.

10. In a money-chest: a heavy-walled cylindrical cast-metal container having a closed bottom wall and having an upper end which is recessed to provide an outer closure-seat, said container having also at a lower level an internal closure-seat; a lock-equipped, key-controlled inner closure fitted in said second-mentioned seat and having bayonet-lug interlock-connection therewith, said closure being equipped with a handle and disposed within hand-reach and liftable by

hand and removable through the upper end of said container; a money-passage forming a communication between the upper and lower compartments thus provided so constructed as to permit deposit by hand of cash through the upper compartment into the lower compartment and prevent re-transfer therethrough to the upper compartment; and a heavy-walled outer closure having bayonet-lug engagement with said first-mentioned seat and equipped with a lock which serves to secure the closure in the interlocked position, said closure being spaced apart to provide substantial depth for said upper compartment.

11. A structure as specified in claim 10, in which said inner closure is equipped with a detachable depending money-bag which is removable through the medium of the closure when the latter is withdrawn through the upper end of said container.

WILLIAM C. MILLER.

CERTIFICATE OF CORRECTION.

Patent No. 1,965,296.

July 3, 1934.

WILLIAM C. MILLER.

It is hereby certified that error appears in the printed specification of the above numbered patent requiring correction as follows: Page 4, line 87, claim 10, for "closure" read closures; and that the said Letters Patent should be read with this correction therein that the same may conform to the record of the case in the Patent Office.

Signed and sealed this 7th day of August, A. D. 1934.

Leslie Frazer

Acting Commissioner of Patents.

(Seal)

[TITLE OF COURT AND CAUSE.]

ANSWER

Defendant answers the bill of complaint herein as follows:

I

Defendant is not advised concerning the incorporation or existence or citizenship of the plaintiff and leaves the plaintiff to its proofs as to such matters.

Defendant admits that it is a corporation organized and existing under the laws of the State of California and that its principal place of business is in the City of Los Angeles in the Central Division of the Southern District of California.

Defendant denies each and every other allegation contained in paragraph I.

II.

Defendant admits all the allegations contained in paragraph II.

III.

Defendant denies that prior to January 28, 1931, or at any other time, or at all, William C. Miller was the first, original and sole inventor, or the first, or the sole or the original inventor, or the inventor of a safe or money chest described or claimed in the applications mentioned in paragraph III.

Defendant denies that the safe or money chest claimed or described in Letters Patent 1,965,296, was invented by William C. Miller, or that it was new, or was not known or used by others in this country for more than two years

prior to January 28, 1931. Defendant denies that the safe or money chest claimed or described in Letters Patent 1,965,296, was not in public use or on sale for more than two years prior to January 28, 1931.

Defendant has no knowledge or belief as to the other allegations contained in paragraph III and therefore denies each and every other allegation contained in paragraph III and leaves plaintiff to its proofs as to such matters.

IV

Defendant denies that the public and manufacturing trade generally or otherwise have recognized Letters Patent 1,965,296, as a valid patent or acquiesced in any right of plaintiff therein or thereunder.

Defendant has no knowledge or belief as to the other allegations contained in paragraph IV and therefore denies each and every other allegation contained in paragraph IV and leaves plaintiff to its proofs as to such matters.

V.

Defendant has no knowledge or belief as to the allegations contained in paragraph V and therefore denies each and all said allegations and leaves plaintiff to its proofs as to such matters.

VI

Defendant denies each and every allegation of infringement or other unlawful act by it in said bill of complaint contained.

VII

Defendant admits that plaintiff has given defendant notice of plaintiff's claims that defendant was infringing said Letters Patent 1,965,296, but denies each and every other allegation contained in paragraph VII.

VIII

Defendant denies the allegations contained in paragraph VIII.

IX

Defendant alleges that Letters Patent 1,965,296, were and are void and of no effect because more than two years prior to January 28, 1931 one Samuel L. Belknap, discovered, invented, manufactured and sold a safe containing among others, all the substantial and material parts described or claimed in said Letters Patent 1,965,296, and further because said safes so manufactured and sold by said Belknap were used by the purchasers thereof from said Belknap more than two years prior to January 28, 1931.

X

Defendant denies that plaintiff has been injured by any act of defendant, and denies that plaintiff is entitled to the relief prayed for in said Bill of Complaint, or any part thereof.

Wherefore, defendant prays judgment as follows: (a) that the Bill of Complaint herein be dismissed with costs and disbursements to defendant; (b) that Letters Patent

1,965,296, are invalid; (c) that William C. Miller is not the discoverer or inventor of the safe described and claimed in said Letters Patent 1,965,296; (d) that defendant has not infringed said Letters Patent 1,965,296; (e) all other and further relief as equity may require.

IN-A-FLOOR SAFE COMPANY, LTD.,

By Samuel L. Belknap

President

Alfred E. Dennis

Solicitor for Defendant

[Endorsed]: Due service & receipt of a copy of the within Answer is hereby admitted this Seventh day of January, 1935. Lyon & Lyon, Atty for plaintiff. Filed Jan. 7, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

MOTION TO AMEND ANSWER

NOW COMES the defendant, by its attorneys, and moves to amend the Answer, as per the attached copy entitled Amended Answer and Counter Claim.

In support of this Motion, defendant asserts:

I.

That the Answer should be amended in order to properly plead defenses available to the defendant, in accordance with Section 4920 R. S.

II.

That the defendant should be permitted to set up a counterclaim based on the fact that the defendant is an exclusive licensee under United States Letters Patent No. 1,887,866 issued to Samuel L. Belknap, who is now President of the defendant, holding substantially all of the stock thereof, which patent pertains to safes of the general character disclosed in the plaintiff's patent in suit, and is being infringed by the plaintiff.

In support of this Motion, defendant will rely upon all of the papers and proceedings on file in this cause and upon the attached points and authorities.

* * * * *

Alfred E. Dennis

Fred H. Miller

Attorneys for Defendant.

[TITLE OF COURT AND CAUSE.]

AMENDED ANSWER AND COUNTER CLAIM

Defendant answers the Bill of Complaint herein, as follows:

1.

Defendant is not advised concerning the incorporation, or existence, or citizenship of the plaintiff, and leaves the plaintiff to its proofs as to such matters.

Defendant admits that it is a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the City of Los Angeles, California.

Defendant denies that it is committing *no* acts of infringement of plaintiff's patent either in Los Angeles, California; in the district or division aforesaid; or elsewhere.

11.

Defendant admits the jurisdiction of this Honorable Court and admits all the allegations contained in Paragraph 11.

111.

Defendant denies that prior to January 28, 1931, or at any other time, or at all, William C. Miller was the first, original and sole inventor, or the first or the sole or the original inventor, or the inventor of a Safe or Money Chest; admits that on January 28, 1931, William C. Miller applied to the Commissioner of Patents for United States Letters Patent, but denies that the application was made in due form of law; admits that William C. Miller, by an

instrument in writing, assigned and transferred unto plaintiff, Diebold Safe & Lock Company, his application; admits that on July 3, 1934, Letters Patent No. 1,965,296 were issued to Diebold Safe & Lock Company, in the name of United States of America, but denies that the same were issued in full compliance with the statutes in such cases made and provided; defendant denies that Diebold Safe & Lock Company, its successors or assigns, were granted the exclusive right to make, use and vend the alleged invention for seventeen years from the date of issuance of the alleged patent throughout the United States and the territories thereof; defendant denies that the alleged invention was new, useful, not known or used by others in this country before the alleged invention thereof by William C. Miller; denies that the alleged invention was not patented or described in any printed publication anywhere prior to the date of the alleged invention or for more than two years before the filing of the application; denies that the alleged invention was not in public use or on sale for more than two years before the filing of the application; denies that the alleged invention was not patented in any foreign country by William C. Miller, or his legal representative, or assigns, on an application filed more than one year before the filing of the application in this country, and denies that the same was not abandoned.

IV.

Defendant denies that the Money Chest alleged to be set forth and claimed in the alleged Miller patent constitutes a distinct advance in the art. Defendant has no knowledge of the extent to which plaintiff has manufactured and marketed the alleged money chests in the United

States, and therefore denies that the same has been manufactured and marketed in large quantities in the United States by plaintiff; defendant has no knowledge as to whether the alleged invention, as exemplified by devices manufactured and marketed by plaintiff, has met with large demand by the public and therefore denies that the alleged invention as exemplified by devices manufactured and marketed by plaintiff has met with large demand by the public; defendant denies that the public and manufacturing trade generally have recognized the alleged Miller patent as a valid patent, and denies that the public and manufacturing trade generally have acquiesced in the exclusive rights of plaintiff thereunder.

V.

Defendant has no knowledge as to whether plaintiff is still the owner of the alleged patent, or whether defendant has parted with any interest therein or thereunder, and therefore denies that plaintiff is still the owner of said patent, and denies that plaintiff is now entitled to sue for and recover for its own use all damages and/or profits arising out of or occasioned by infringement of the alleged Letters Patent.

VI.

Defendant denies that since the grant of the alleged Miller patent No. 1,965,296, or at any other time, defendant has infringed the alleged patent by making, using and/or selling in the Central Division of the Southern District of California, or elsewhere, safes embodying the alleged invention disclosed in the alleged patent and alleged to be covered by the claims thereof; defendant denies that it threatens to continue the alleged infringement.

V11.

Defendant has no knowledge as to whether plaintiff has marked the safes of its manufacture alleged to be covered by the Miller patent with the patent number, and therefore denies that the plaintiff has so marked the safes of its manufacture; defendant admits having received notice of plaintiff's claims that defendant was infringing said Letters Patent No. 1,965,296, but denies that defendant has, or continues to infringe said Letters Patent.

V111.

Defendant denies that plaintiff has been injured by and suffered damage as a result of any acts of the defendant; denies that any acts of the defendant alleged to be infringements were premeditated, wilful, or in defiance of plaintiff's rights; defendant denies that it has made any gains or profits from any of its acts to which plaintiff is in any wise entitled.

1X.

As a first affirmative defense, defendant further answering upon information and belief, alleges: That the said Letters Patent and each of the claims thereof are void and of no force and effect because the alleged invention and improvements claimed therein and covered thereby, and each and every substantial and material part thereof, was long prior to any invention or discovery thereof by the said William C. Miller, described in the following printed publication: Automotive Service Management, April, 1929, pages 20 and 43, published by Trade News Publications, Inc., James H. Collins, Editor, 323 Beaux Arts Building, 1709 West 8th Street, Los Angeles, California.

X.

As a further, separate and second affirmative defense defendant alleges upon information and belief: That prior to the alleged invention of William C. Miller, and prior to his filing of application for patent in the Patent Office of the United States, that the defendant, by its President, Samuel L. Belknap, exhibited the alleged invention to the Cashier of Coats Safe and Lock Company, of New Orleans, Louisiana, which concern was the Southern Factory Branch of the plaintiff herein, and that the defendant, by its President, Samuel L. Belknap, exhibited the invention to Mr. H. A. Noble, Vice-President and General Sales Manager for the plaintiff herein, and to E. W. Nelson of the General Sales Department of the plaintiff herein, which officers of the plaintiff, upon defendant's information and belief, communicated the disclosures by the defendant to William C. Miller, and the said William C. Miller, seeking surreptitiously to appropriate the aforesaid invention, or so much thereof as is embraced in the claims of the patent sued on, unjustly and unlawfully filed in the Patent Office in the United States an application therefor; therefore he falsely alleged himself to be the inventor thereof, and therefore he surreptitiously and unjustly obtained the patent sued on for that which was in fact invented by the said Samuel L. Belknap, who was using reasonable diligence in adopting and perfecting his said invention.

X1.

As a further, separate and third affirmative defense, defendant avers upon information and belief: That the Letters Patent in suit are invalid and void for the reason that the patentee was not the original or first inventor

thereof, in that the same and all material and substantial parts thereof were known and in public use in the United States prior to the alleged invention by the said patentee by the following persons, to-wit: Samuel L. Belknap, of 2020 Circle Drive, Hermosa Beach, California.

X11.

As a further, separate and fourth affirmative defense, defendant avers upon information and belief: That the Letters Patent in suit are invalid and void for the reason that the patentee was not the original or first inventor thereof, in that the said alleged invention described and claimed as new in the Letters Patent in suit, or a substantial or material part thereof, was, before the alleged invention thereof by the said William C. Miller, used by Samuel L. Belknap and In-A-Wall Safe Co., such use being in Los Angeles, County of Los Angeles, State of California.

X111.

As a further, separate and fifth affirmative defense, defendant avers upon information and belief: That the Letters Patent in suit are invalid and void for the reason that the patentee was not the original or first or any inventor thereof, and that the same and all material and substantial parts thereof were invented prior to the alleged invention by the said patentee by Samuel L. Belknap, residing at 2020 Circle Drive, Hermosa Beach, California.

X1V.

As a further, separate and sixth affirmative defense, defendant alleges upon information and belief: That said Letters Patent in suit are invalid and void because the alleged invention or discovery described and claimed there-

in, and all material and substantial parts thereof, was for more than two years prior to the application for said Letters Patent in public use and on sale in the United States by the following named persons, at the places indicated, to-wit:

In-A-Wall Safe Co. 756 So. Figueroa St. Los Angeles, California. Residence, same.

Samuel L. Belknap, 756 So. Figueroa Street, Los Angeles, California. Residence, 2020 Circle Drive, Hermosa Beach, Cal.

XV.

As a further, separate and seventh affirmative defense, defendant alleges upon information and belief: That the said Letters Patent in suit are invalid and void because, in view of the state of the prior art as known at the time of and long prior to the alleged invention or discovery of the alleged invention purported to be patented, did not constitute patentable invention but involved nothing more than the exercise of mere mechanical skill, which prior art, the defendant is ready to aver and prove, includes the use and sale by In-A-Wall Safe Co. and others of devices embodying the invention disclosed, described and claimed in United States Letters Patent No. 1,887,866, issued November 15, 1932, to Samuel L. Belknap; and the disclosures in the following printed publications:

Service Station Management, January, 1929, Inside of cover;

Service Station Management, February, 1929, Inside of cover;

Service Station Management, March, 1929, Inside of cover;

this publication being published by Trade News Publications, Inc., James H. Collins, Editor, 323 Beaux Arts Building, 1709 West 8th Street, Los Angeles, California.

WHEREFORE, defendant PRAYS:

1.

That insomuch as this action is founded on the Bill of Complaint herein, that the Bill of Complaint be dismissed with costs and disbursements to the defendant.

11.

That a decree be entered declaring Letters Patent No. 1,965,296 to be invalid and void.

111.

That a decree be entered declaring that United States Letters Patent No. 1,965,296 had not been infringed by the defendant.

IV.

For such further equitable relief as the case may require.

COUNTER CLAIM

The defendant, counter claiming against the plaintiff, herein alleges:

A.

The defendant is a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the City of Los Angeles, California.

B.

Upon information and belief, the plaintiff is a corporation organized and existing under the laws of the State

of Ohio, having its principal place of business in Canton, Ohio, and is a citizen and inhabitant of said State of Ohio, and is committing acts of infringement of defendant's patent, as hereafter set forth.

C.

This court has jurisdiction of this counter claim under the provisions, Equity Rule 30, as the same is based upon Letters Patent of the United States, No. 1,887,866, issued November 15, 1932, relating to Double Door Floor Safes, and is brought under the patent laws of the United States.

D.

Heretofore and on or before the 13th day of December, 1926, Samuel L. Belknap became and was the original, first and sole inventor of new and useful Improvements in Double Door Safes not known or used by others in this country, or patented or described in any printed publication in this or any foreign country before the invention or discovery thereof by said Samuel L. Belknap, or more than two years prior to his hereinafter mentioned application for Letters Patent therefor, and no application for any foreign Letters Patent therefor having been filed more than twelve months prior to the filing of the application for Letters Patent in this country, and which had not been in public use or on sale in the United States for more than two years prior to said Samuel L. Belknap's application for patent therefor, and which invention had not been abandoned to the public; that on said 13th day of December, 1926, Samuel L. Belknap, plaintiff herein, filed his written application, Serial No. 154,497, in the office of the Commissioner of Patents of the United States of America for the grant of Letters Patent upon

the aforesaid invention, disclosing, describing and claiming said invention in accordance with the United States Statutes made and provided; that thereafter said application was withdrawn with the intent to file a new and substitute application for the same invention, and accordingly, Samuel L. Belknap filed, on September 16, 1930, a new application, Serial No. 482,345, in the office of the Commissioner of Patents of the United States for the grant of Letters Patent upon the aforesaid invention; that Samuel L. Belknap having duly complied in all respects with the conditions and requirements of the United States Statutes in such cases made and provided, and after due examination by the Commissioner of Patents as to the novelty and utility of said invention, there were issued to the said Samuel L. Belknap under date of November 15, 1932, in due compliance with the Statutes in such cases made and provided, Letters Patent of the United States, No. 1,887, 866, whereby there was granted to Samuel L. Belknap, his heirs or assigns, for the term of seventeen years from the 15th day of November, 1932, the exclusive right to make, use and vend the said invention throughout the United States and the territories thereof, as, by the original of said Letters Patent or a duly certified copy thereof in Court to be produced, will more fully appear.

E.

That on or about the 4th day of August, 1930, the said Samuel L. Belknap, being the applicant in application, Serial No. 154, 497, granted unto Charles H. Seiter, of Los Angeles, California, a sole and exclusive license to use the said invention during the term of the patent to be granted thereon throughout the world, and to sell and

dispose of goods manufactured according to said invention when and as the Licensee shall think fit for his own use and benefit absolutely.

That part of said agreement provides:

"8. In case the said Letters Patent shall be infringed the patentees, shall, at their own cost, take all necessary proceedings to effectually defend the same; and in default of so doing, it shall be lawful for the licensee, in the name of the patentees and at their cost, to take all necessary proceedings for defending the same; or it shall be lawful for the licensee, by notice in writing given to the patentees or left at the usual or last place of business or residence, to determine this agreement."

"9. The patentees shall not at any time during the continuance of this license use the said invention or any future improvements thereof, or grant any license to any other person to use the same or any such improvements."

That the said sole and exclusive license was made assignable by the parties thereto, according to the terms thereof, profert of said exclusive license agreement being hereby made.

F.

That Charles H. Seiter, being then the exclusive licensee under the application, Serial No. 154,497, as aforesaid, on or about the 5th day of January, 1931, assigned all of his rights derived from the exclusive license agreement dated August 4, 1930, to In-A-Floor Safe Co., Ltd., a corporation duly organized and existing under the laws of the State of California, the defendant in this action, whereby the defendant became and now is the exclusive licensee under the application, Serial No. 154,497, for

which substitute application, Serial No. 482,345, was subsequently filed, and which matured into United States Letters Patent No. 1,887,866, and has all the rights of an exclusive licensee thereunder. Profert of the instrument executed January 5, 1931, by Charles H. Seiter or duly certified copy thereof, is hereby made.

G.

That defendant further states that by virtue of the premises aforesaid, it has become and now is the sole owner of the exclusive license in and under said Letters Patent, and all rights and privileges granted and secured thereby, and is entitled to sue as an exclusive licensee, either alone or jointly with the patentee, Samuel L. Belknap, for injunctive relief against an infringement thereof and to recover any profits and/or damages arising out of infringement of said Letters Patent; that Samuel L. Belknap has become and now is the President of the defendant, In-A-Floor Safe Co., Ltd., and is the principal stockholder thereof, and is willing to join the defendant in this counter claim, and to stand to and abide by such further order of this Court.

H.

That the invention or discovery as patented as aforesaid, was and is of great utility, and that the public has generally acquiesced in the usefulness of said improvement, and has generally acknowledged and acquiesced in the rights of the defendant and Samuel L. Belknap with respect to said invention and as to the validity of said Letters Patent; that the plaintiff herein, Diebold Safe & Lock Company, having had notice of the aforesaid Letters Patent, and well knowing the premises and rights

of the defendant herein and the said Samuel L. Belknap, and acting in conjunction with others in contriving to injure the defendant and Samuel L. Belknap in order to deprive them of the profits, benefits and advantages which might and otherwise would have been accrued to it from said invention and improvement, and without the license or permission of defendants and Samuel L. Belknap, and against their will and protest, and in violation of their rights in said Letters Patent, ever since the issue of said Letters Patent and the license thereof and the assignment thereof, as aforesaid, and prior to the commencement of this suit, and since notice, have unlawfully and wrongfully manufactured, used and sold and caused to be manufactured, used and sold, and is now manufacturing, using and selling, and causing to be manufactured, used, and sold within the United States, Double Door Safes embodying the invention set forth and claimed in said Letters Patent; that the aforesaid unlawful acts and doings of the plaintiff constitute a violation and an infringement of said Letters Patent, and defendant's exclusive right and privilege in and to the same, and said acts and doings of the plaintiff have resulted and are now resulting and will result if continued unrestrained, in manifest and irreparable injury in the rights of defendant and Samuel L. Belknap.

I.

That since the granting of said Letters Patent, the execution of the exclusive license thereunder and the assignment thereof, defendant has complied with provisions of Section 4900 of the Revised Statutes of the United States by affixing upon the safes containing said improvement and invention as made by it the word "Pat-

ented" together with the number of the patent, and in addition thereto Samuel L. Belknap has given due and actual notice to the plaintiff of said Letters Patent and of the infringement herein complained of.

J.

That but for the infringement herein complained of, the defendant would still be in the undisturbed possession, use and enjoyment of the exclusive license under said Letters Patent, and in the receipt of large gains and profits from the same, and that the plaintiff has made and realized large profits and advantages from its said infringement, and defendant says that the use of the said invention by the plaintiff and its continuation in the same and unlawful acts in the premises and disregard and defiance of the rights of defendant and of Samuel L. Belknap, have the effect to and do encourage others to venture to infringe said several Letters Patent in disregard of defendant's rights.

WHEREFORE, the defendant PRAYS:

1.

That an Order be entered that Samuel L. Belknap be brought in as a defendant, as provided in the last paragraph of Equity Rule 30.

11.

For a Decree adjudging said Letters Patent No. 1,887,866 are good and valid and are owned by Samuel L. Belknap, under whom defendant has a sole and exclusive license, and that said Letters Patent have been infringed by the plaintiff.

111.

That the plaintiff, its directors, officers, agents, workmen, employees and confederates, and each of them, may be perpetually enjoined and restrained by a Writ of Injunction, from directly or indirectly manufacturing, using or selling, or causing to be manufactured, used or sold, devices made in accordance with the invention and improvements of the aforesaid Letters Patent, and from in any wise infringing said patent or contributing to the infringement of said patent by others, and conspiring with others to so infringe said Letters Patent.

IV.

That the plaintiff be Ordered and Decreed to deliver to the defendant all of said infringing safes which it has in its possession or under its control, or that such apparatus be destroyed, or that the same be delivered to this Honorable Court and be impounded.

V.

That the plaintiff may be Decreed to account to the defendant and Samuel L. Belknap for all the gains, profits, and advantages realized by said plaintiff from its infringement and unlawful use and practice of the invention patented in and by said Letters Patent, and in addition to said gains, profits and advantages to be so accounted for, the damages sustained by the defendant as a result of said infringement, and that the amount of the damages for said infringement may, in view of the wilful character of the infringement, be increased to a sum

not exceeding three times the amount thereof, as provided by law.

V1.

That the plaintiff be required to reply to this counter claim, as provided in Equity Rule 31.

V11.

That the plaintiff be Decreed to pay the costs, charges and disbursements of this suit.

V111.

That the defendant may have such other and further relief in the premises as the equity of the case may require and to the Court may seem meet and just.

1X.

That a Preliminary Injunction may be granted to the defendant as against the plaintiff, to the same purport, tenor and effect as hereinbefore prayed for in regard to said Perpetual Injunction.

IN-A-FLOOR SAFE CO., LTD.

By S. L. Belknap

President.

Alfred E. Dennis

Fred H. Hiller

Counsel.

That he is President of the defendant corporation herein; that he has read the foregoing Amended Answer and Counter Claim by him subscribed and knows the contents thereof and that the same is true to his own knowledge except as to matters therein stated to be alleged upon information and belief, and as to these matters he believes it to be true.

Sworn to and subscribed before me this 6 day of
Nov., 1935.

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Received copy of the within Notice of Motion etc this 9th day of November, 1935 Lyon & Lyon *Attorney* for Plaintiff. Filed Nov. 9, 1935 R. S. Zimmerman Clerk By B. B. Hansen, Deputy Clerk.

HAZARD & MILLER
CENTRAL BUILDING
CORNER SIXTH AND MAIN STS.
LOS ANGELES

FILED

MAY 12 1936

R. S. ZIMMERMAN, Clerk

By -----
Deputy Clerk

Nov. 15, 1932.

S. L. BELKNAP

1,887,866

DOUBLE DOOR FLOOR SAFE

Original Filed Dec. 13, 1926

2 Sheets-Sheet 1

Fig. 1.

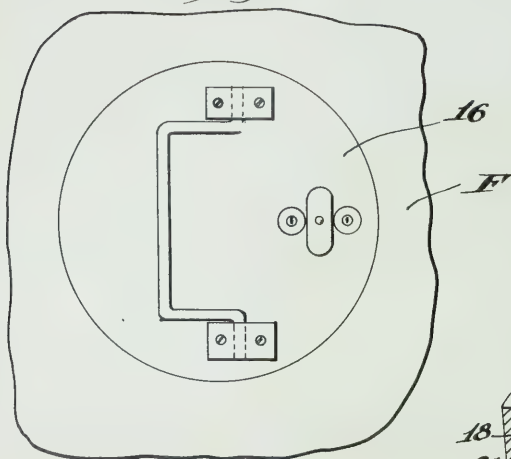


Fig. 3.

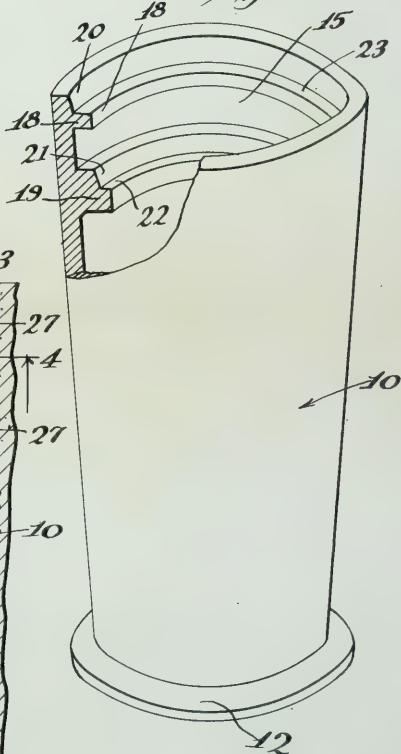
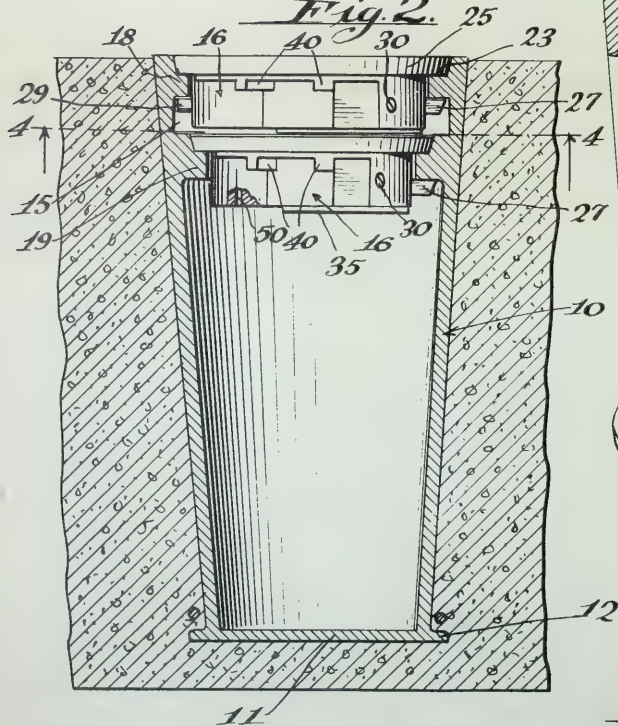


Fig. 2.



Witness:
H. H. H. H.

Inventor
Samuel L. Belknap
by Hazard and Miller
Attorneys

Fig. 4.

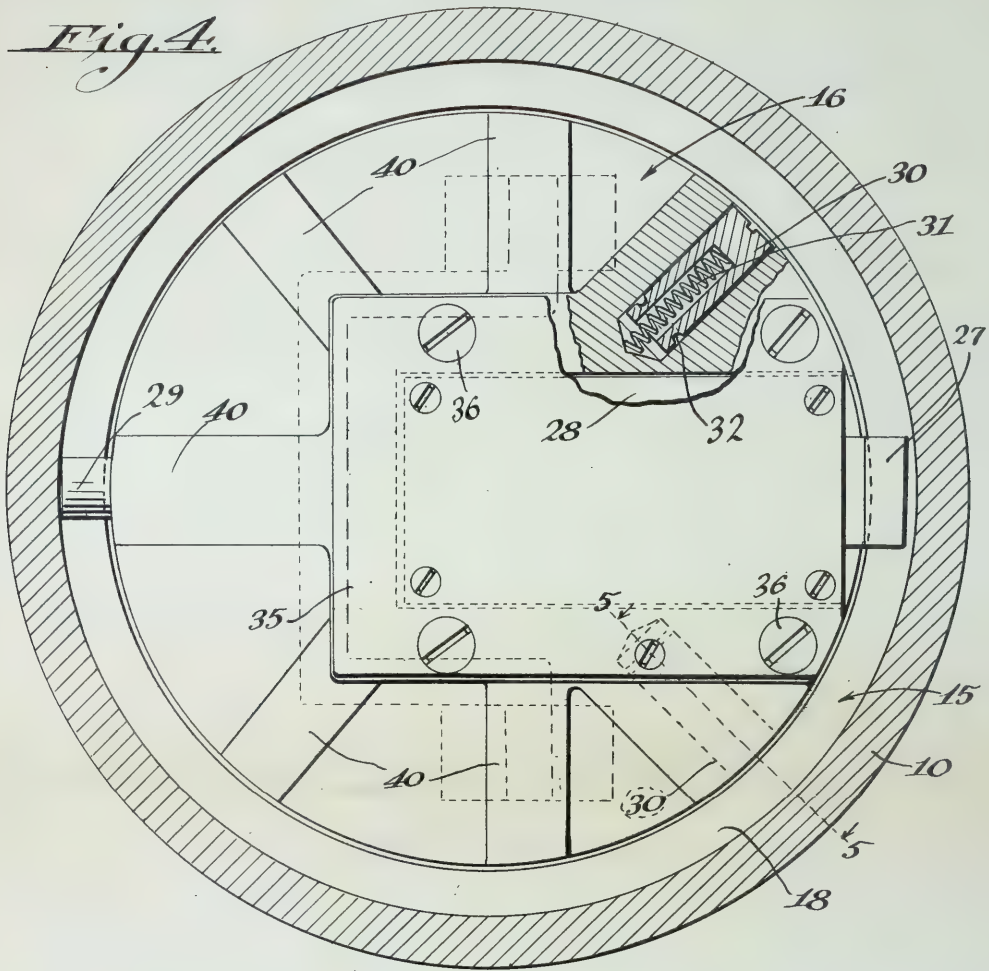


Fig. 5.

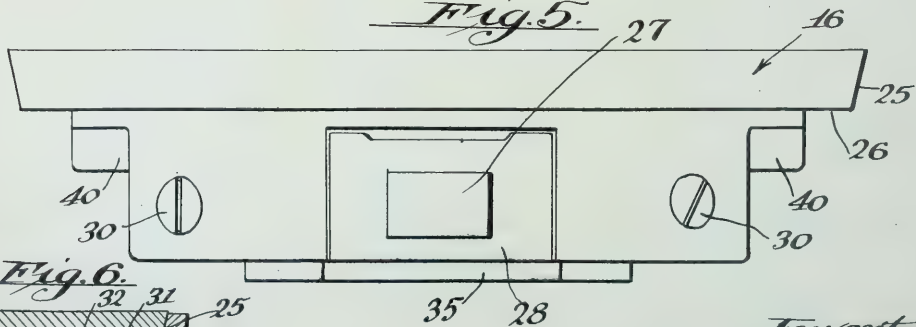
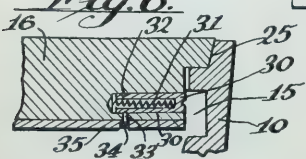


Fig. 6.



Inventor
Samuel L. Belknap
by Hazen and Miller
Attorneys

UNITED STATES PATENT OFFICE

SAMUEL L. BELKNAP, OF LOS ANGELES, CALIFORNIA

DOUBLE DOOR FLOOR SAFE

Substituted for application Serial No. 154,497, filed December 13, 1926. This application filed September 16, 1930. Serial No. 482,345.

This invention relates to floor safes adapted to be embedded in a concrete floor or recesses in a wall for receiving and protecting valuables. The application may be considered as a substitute application for my prior application Serial No. 154,497, filed December 13, 1926.

An object of this invention is to provide an improved safe of extremely durable construction which is of such a nature that it can neither be removed bodily from the concrete floor or wall, as the case may be, or broken into.

Another object of the invention is to provide an improved safe having a plurality of doors which are adapted to be locked in place by different locks. By such an arrangement, wherein one person is able to unlock one door only and another person is required to unlock the second door, the presence of two persons will be required on removing articles from the safe, thus affording a protection against fraud. Such an arrangement makes the improved safe one which can be advantageously employed in chain stores, service stations, and the like.

Another object of the invention is to provide a safe having a door which is so constructed that if the door is tampered with or an attempt is made to punch the lock of the door through, that the door will become immediately and permanently locked in place.

Another object of the invention is to provide a safe having two doors arranged one behind the other, the inner door being provided with a coin slot so that on removing the outer door valuables may be deposited through the coin slot in the inner door and allowed to drop into the safe. By such an arrangement an attendant at a service station or a chain store can remove the outer door and deposit excess cash in the safe without removing the inner door. In the event that he is forced to open the outer door or is robbed while the outer door is removed, the inner door, which can be opened only by the collector, affords a barrier preventing the taking of the valuables in the safe.

Still another object of the invention is to provide a safe having one or more doors, each

of which can be rotated while in locked condition so that the ready rotation of the door effectively prevents cutting it with various implements.

Another object of the invention is to provide a safe having a container so constructed as to effectively prevent its being removed bodily from a concrete floor or wall.

With the foregoing and other objects in view, which will be made manifest in the following detailed description and specifically pointed out in the appended claims, reference is had to the accompanying drawings for an illustrative embodiment of the invention, wherein:

Fig. 1 is a top plan view of a section of floor, illustrating the improved safe embedded therein.

Fig. 2 is a vertical section of the improved safe illustrated as having been embedded in a concrete floor.

Fig. 3 is a perspective view, partly in section, showing the container forming a part of the safe.

Fig. 4 is a horizontal section taken upon the line 4—4 upon Figure 2.

Fig. 5 is a view in side elevation of one of the doors.

Fig. 6 is a sectional view of a portion of one of the doors illustrating the details of a safety locking device.

Referring to the accompanying drawings, wherein similar reference characters designate similar parts throughout, the improved safe consists of a container 10, which is frusto-conical in form with the large end of the container providing its entrance and adapted to be positioned flush with the surface of the floor F. The small end of the container forms the back or bottom 11 which is integral and which provides an outwardly extending annular flange 12. As shown upon the drawings, the exterior surface of the safe is straight, that is its walls diverge upwardly along straight lines. Such an arrangement does not afford any purchase for prying the safe bodily out of the floor, even in the event that the concrete of the floor F should be chipped away around the top of the safe. The flange 12 also effectively prevents re-

removal of the safe container 10 bodily from the floor and, if desired, reinforcing rods may be embedded in the concrete over the flange assisting in causing the flange to anchor the safe in place. The frusto-conical shape of the container is such that in the event that the safe is pounded with the intent of causing the bottom 11 to pulverize the concrete beneath it, the downwardly convergent walls assist in preventing loosening of the safe in that they can transmit some of the compression stresses to the concrete. In other words the walls of the container can withstand stresses over and above those which could be withstood by the adhesive bond between the concrete and the container alone.

The entrance 15 is adapted to be closed by a pair of circular doors 16 and 16' which are substantial duplicates. The lower or inner door 16' is slightly smaller in width than the upper door but in other essential features the two doors are substantially the same. The container 10 is provided near the entrance with inwardly extending flanges 18 and 19 which flanges form seating surfaces for the doors 16 and 16'. The lower flange 19 is also provided with a beveled surface 21 and the top of the container is beveled at 20. The seating surfaces are indicated at 22 and 23. The door 16 has a complementary beveled surface 25 adapted to seat on beveled surface 20 and a surface 26 which seats on surface 23.

A lock 28 extends through each door, the body of the lock being fastened in place on the door by a plate 35 which is secured to the door by screws 36. This lock serves to operate a bolt 27 which is adapted to be projected outwardly beneath its respective flange. Diametrically opposite the bolt a lug 29 is provided which is also positioned beneath the flange. When the lug 29 is beneath the flange and the bolt 27 is projected locking the door in place, by virtue of the circular form each of the doors can be rotated readily while in closed position so that if an attempt is made to chisel through the door it will rotate, hindering the chiseling. Reinforcing ribs, illustrated at 40, serve to reinforce the bodies of the doors.

Each door is provided with a safety locking device, the details of which are illustrated in Figures 4 and 6. This locking device comprises a hollow tubular safety latch 30 adapted to receive a coil spring 31. This coil spring is normally compressed and urges the tubular member outwardly into a position beneath the flange. A groove 32 is formed on the exterior surface of the latch and a pin 33, which is secured to the plate 35, extends into the groove and keeps the safety latch in normally retracted position.

In the event that an attempt is made to punch the lock through the door, plate 35 will be sprung or flexed. This flexing or springing of the plate draws the pin out of the

groove, releasing the safety latch and allowing it to be projected by the spring beneath the flange, thus permanently locking the door in place. While the drawings illustrates the door as being provided with only two of these safety latches, any number can be employed as desired.

As clearly shown upon the drawings, the lock or locks in each door are located otherwise than at the center; or if one lock is located at the center of its door, the other lock is located elsewhere. By virtue of the fact that both doors are rotatable while in closed position, it is impossible for a thief to so position the doors as to align the locks and attempt to punch both locks through simultaneously. This is because of the concealed nature of the position of the inner door from the exterior of the safe.

The doors are preferably located very close together, as illustrated in Figure 2, so that the lock in the upper door cannot be punched through and also so that in the event that the upper door were melted by an acetylene torch or electric arc the molten metal would puddle immediately beneath it on the surface of the inner door and would not flow away.

The inner door is provided with a coin slot 50 which does not extend through the outer door. By giving a service station attendant the key or keys to the outer door only, or the combination of the lock in the outer door only in the event that a combination lock is employed, such attendant only has power to open the outer door. On removal of the outer door he can deposit excess cash or valuables in the safe by dropping them through the coin slot 50. The manager of the store or the collection agent being the only person to have power to open the inner door, both parties are required to be present to open the safe. The attendant by being present can verify as to the amount removed from the safe by the manager or collection agent which will advantageously serve for his own protection. In the event that the attendant should be forced to open the outer door or should be held up while the outer door was removed, the inner door forms an effective barrier against unauthorized persons removing valuables from the safe.

The outer door in the safe also forms an effective closure for the coin slot in the inner door so that whenever the outer door is in place it is impossible to withdraw articles from the safe through the coin slot by means of "fishing wires" or similar instruments. Also as the coin slot is closed by the outer door it is impossible to pour explosives into the safe through the coin slot to blow out the door. These advantages are highly desirable and are of great utility as compared with safes having coin slots which are always open or available from the exterior of the safe.

The form of the container is such that the diameters of the doors are greater than the diameter of the small end of the safe so that if the doors should be pounded through, breaking off or bending the flanges, they will wedge against the sides of the container before reaching the bottom and effectively prevent removal of articles from the safe.

From the above described construction it will be apparent that I have provided a safe which cannot be opened by ordinary tools. Furthermore the safe cannot be easily removed bodily and carried away. The improved safe is of relatively simple construction and can be easily and quickly embedded in a wall or floor.

Various changes may be made in the details of construction without departing from the spirit or scope of the invention as defined by the appended claims.

I claim:

1. A safe comprising a container, two doors for the entrance to the container, each door being rotatable while in closed position, a lock in each door for locking the door against removal, the locks being located otherwise than at the centers of their respective doors to prevent the locks being aligned and punched through.

2. A safe comprising a container, two doors for the entrance to the container, each door being rotatable while in closed position, a lock in each door for locking the door against removal, the locks being located otherwise than at the centers of their respective doors to prevent the locks being aligned and punched through, there being a coin slot formed through the inner door but which does not extend through the outer door, said coin slot being likewise located otherwise than at the center of the inner door.

3. A safe comprising a container, two doors for the container arranged one behind the other, the inner door being rotatable while in closed position, and a lock for each door whereby by virtue of the concealed nature of the position of the inner door from the exterior of the outer door the locks cannot be aligned and simultaneously punched through.

4. A safe comprising a container, two doors for the container arranged one behind the other, said doors being rotatable while in closed position, locks for the doors, said locks being otherwise than in alignment so that they cannot be simultaneously punched through.

In testimony whereof I have signed my name to this specification.

SAMUEL L. BELKNAP.



At a stated term, to wit: The February Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 10th day of March in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable Wm P. James, District Judge.

DIEBOLD SAFE & LOCK COM-)
 PANY, a corporation,)
)
 Plaintiff,)
)
 vs.) No. Eq-478
)
 IN-A-FLOOR SAFE CO., LTD., a)
 corporation,)
)
 Defendant.)

A motion on the part of the defendant for leave to file an amended answer and counterclaim and by such counterclaim to bring in Samuel L. Belknap as owner of the patent right sought to be made the subject of said counterclaim because of alleged infringement of said patent right by the plaintiff, having been heretofore presented to the court and submitted for ruling; and the court now having considered said motion, orders that the same be granted as to permit the defendant to file its amended answer raising proper issues as against the plaintiff's alleged cause of action, except that the application for leave to assert a counterclaim and to bring in the said Belknap is denied. An exception is noted in favor of the respective parties to the making of this order.

[TITLE OF COURT AND CAUSE.]

ORDER GRANTING DEFENDANT'S MOTION TO
AMEND ANSWER AND DENYING MOTION
TO ASSERT A COUNTERCLAIM AND TO
BRING IN SAMUEL L. BELKNAP AS CO-
DEFENDANT

— — — — —

THIS CAUSE HAVING COME ON TO be heard
upon defendant's motion for leave to file an amended an-
swer and to assert a counterclaim and by such counter-
claim to bring in Samuel L. Belknap as co-defendant, and

The same having been argued in open court and sub-
mitted upon briefs of the parties, and

The Court now having considered said motion,

IT IS HEREBY ORDERED:

(1) That the defendant be permitted to file its
amended answer raising proper issues as against the
plaintiff's alleged cause of action.

(2) That the application for leave to assert a coun-
terclaim and to bring in the said Samuel L. Belknap be
denied.

An exception is noted in favor of the respective parties.

Dated this 9 day of April, 1936.

Wm. P. James

UNITED STATES DISTRICT JUDGE.

Approved as to form as provided in Rule 44.

Attorneys for Plaintiff.

Fred H. Miller

Attorneys for Defendant.

[Endorsed]: Received copy of the within order this 9 day of April, 1936. Lyon & Lyon, *Attorney* for plaintiff. Filed Apr. 9, 1936 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL

To the Honorable Judge of the United States District Court, in and for the Central Division of the Southern District of California:

The above named defendant, IN-A-FLOOR SAFE CO., LTD., a corporation, feeling aggrieved by the Minute Order entered in the above entitled cause on March 10, 1936, and the formal order entered in the above entitled cause on April 9, 1936, DOES HEREBY APPEAL from said order to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignments of error filed herewith and it prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings, and documents upon which said order was based, duly authenticated, be sent to the United States Court of Appeals for the Ninth Circuit under the rules of such Court in such case made and provided.

AND YOUR PETITIONER FURTHER PRAYS that the proper order relating to the required security to be required of it be made.

All of which is respectfully submitted.

IN-A-FLOOR SAFE CO., LTD.

By Fred H. Miller

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL

Considering the petition for appeal in the above entitled cause this day presented,

IT IS ORDERED:

That an appeal be allowed to IN-A-FLOOR SAFE CO., LTD., the petitioner therein, and defendant in this suit, from the order rendered against the defendant in the above entitled and numbered cause, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the Ninth Circuit and that a certified transcript of the record, stipulations, and all proceedings be forthwith transmitted to and filed in the United States Circuit Court of Appeals for the Ninth Circuit, according to law, as prayed for.

Dated: Los Angeles, California, April 9, 1936.

Wm. P. James

United States District Judge.

[Endorsed]: Received copy of the within Order this 9 day of April, 1936. Lyon & Lyon *Attorney* for plaintiff. Filed Apr. 9-1936 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

* * * * *

DIEBOLD SAFE & LOCK COM-)	
PANY, a corporation,)	
)	
	)	Plaintiff,
)	
	)	IN EQUITY
vs.	)	NO. 478-C
)	
IN-A-FLOOR SAFE CO., LTD., a)	
corporation,)	
)	
	)	Defendant.

ASSIGNMENTS OF ERROR

NOW COMES the above named defendant, IN-A-FLOOR SAFE CO., LTD., a corporation, and files the following assignments of error upon which it will rely upon the prosecution of appeal in the above entitled cause from the minute order entered and recorded on the 10th day of March, 1936, and the formal order entered and recorded on the 9th day of April, 1936, denying the application for leave to assert a counterclaim and to bring in SAMUEL L. BELKNAP as a defendant.

The United States District Court for the Central Division of the Southern District of California erred:

(1) In denying the application for leave to assert a counterclaim.

(2) In denying the application for leave to bring in Samuel L. Belknap as co-defendant.

(3) In failing to order that the defendant be granted leave to assert a counterclaim and that Samuel L. Belknap be brought in as co-defendant.

WHEREFORE, APPELLANT PRAYS:

That said order be reversed and that said District Court of the Central Division for the Southern District of California be ordered to enter an order vacating its order denying the application for leave to assert a counterclaim and to bring in Samuel L. Belknap, and that it enter an order granting the application for leave to assert a counterclaim and to bring in Samuel L. Belknap.

IN-A-FLOOR SAFE CO., LTD.,

By Fred H. Miller

[Endorsed]: Received copy of the within Assignments of Error this 9 day of April 1936. Lyon & Lyon Attorneys for plaintiff. Filed Apr. 9 1936. R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

BOND ON APPEAL

KNOW ALL MEN by these presents that we, IN-A-FLOOR SAFE CO., LTD., as principal, and Eunice Larsen and E. H. Baller, as sureties, of the County of Los Angeles, State of California, are held and firmly bound unto DIEBOLD SAFE & LOCK COMPANY, in the sum of two hundred fifty dollars (\$250.00) lawful money of the United States to be paid to it, its successors or assigns, to which payment well and truly be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators by these presents. Sealed with our seals this 11th day of May, 1936.

WHEREAS, the above named IN-A-FLOOR SAFE CO., LTD., is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the Order Granting Defendant's Motion to Amend Answer and Denying Motion to Assert a Counter claim and to Bring in Samuel L. Belknap as co-defendant rendered in the above entitled suit in the District Court of the United States for the Southern District of California, in equity, on the 9th day of April, 1935,

NOW, THEREFORE, the condition of this obligation is such that if the above named IN-A-FLOOR SAFE CO., LTD., shall prosecute its said appeal to effect or if it fails to make good its appeal shall answer all costs adjudged against it by reason thereof this obligation shall

be void, otherwise the same shall be and remain in full force and virtue.

IN-A-FLOOR SAFE CO., LTD.

[Seal]

By S. L. Belknap

President.

S. W. Belknap

Secretary.

Eunice Larsen

Surety

E. H. Baller

Surety.

STATE OF CALIFORNIA,)
COUNTY OF LOS ANGELES) SS:

AFFIDAVIT

On the 11th day of May, 1936, personally appeared before me Eunice Larsen and E. H. Baller, respectively known to me to be the persons referred to in and who duly executed the foregoing instrument as parties thereto and respectively acknowledged that each for himself they executed the same as free act and deed for the purposes therein set forth.

And the said Eunice Larsen and E. H. Baller, being respectively by me duly sworn, says each for himself and not one for the other that he is a resident and householder of the said County of Los Angeles and that he is

worth the sum of two hundred fifty dollars (\$250.00) over and above his just debts and legal liability and properties exempt from execution.

Eunice Larsen

E. H. Baller

Subscribed and sworn to before me this 11th day of May, 1936,

[Seal]

A. I. Smith

Notary Public in and for the County of Los Angeles,
State of California.

Examined and recommended for approval as required in Rule 28.

Fred H. Miller

The within bond is approved both as to its sufficiency and form this 12 day of May, 1936, to operate as a cost bond on appeal.

Wm. P. James

U. S. District Judge.

[Endorsed]: Filed May 12 1936 R. S. Zimmerman,
Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION RE TRANSCRIPT OF RECORD
ON APPEAL

The above named defendant, having taken an appeal in this cause to the United States Circuit Court of Appeals for the Ninth Circuit from the order granting defendant's motion to amend answer and denying motion to assert a counterclaim and to bring in Samuel L. Belknap as co-defendant, entered herein on the 9th day of April, 1936, and it being the intention of the parties to agree on the contents of the record on said appeal,

IT IS HEREBY STIPULATED at the request of the defendant-appellant, subject to the approval of the District Court, that the Clerk of the District Court shall, upon the approval of this stipulation, prepare a transcript of record for use on appeal, the same to constitute the record on appeal, which shall include true and correct copies of the following:

1. Bill of complaint filed December 18, 1934.
2. Defendant's answer filed.
3. Motion to amend answer (excluding attached points and authorities).
4. Amended answer and counterclaim (proposed).
5. Minute order entered March 10, 1936.
6. Order granting defendant's motion to amend answer and denying motion to assert a counterclaim and to bring in Samuel L. Belknap as co-defendant, entered April 9, 1936.
7. Petition for appeal.
8. Order allowing appeal.
9. Assignments of error.

10. Citation on appeal.
11. Bond on appeal.
12. This stipulation.
13. Clerk's certificate under seal, certifying the cost of certifying the record and when the record is printed agreeable to rules of court a statement of the cost thereof and by whom paid.

IT IS FURTHER STIPULATED that the transcript of record may include an uncertified copy of United States Letters Patent No. 1,965,296, granted upon the application of William C. Miller, on which the plaintiff's cause of action is based; and an uncertified copy of United States Letters Patent No. 1,887,866 issued to Samuel L. Belknap, on which defendant's proposed counterclaim is based.

IT IS FURTHER STIPULATED that in printing said transcript after the title of the court and the cause preceding the bill of complaint therein that said title on subsequent papers need not be printed but that in lieu thereof the words "Title of Court and Cause" be substituted.

Dated this 8th day of May, 1936.

Lyon & Lyon

Attorneys for Plaintiff.

Fred H. Miller

Attorney for Defendant.

APPROVED AND SO ORDERED this 12 day of May, 1936.

Wm P. James

U. S. District Judge.

[Endorsed]: Filed May 12, 1936 R. S. Zimmerman,
Clerk By Edmund L. Smith Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 42 pages, numbered from 1 to 42 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer; motion to amend answer; amended answer and counterclaim; orders granting leave to file amended answer and denying leave to assert a counterclaim and bring in Samuel L. Belknap; petition for appeal and order allowing appeal; assignments of error; bond on appeal; stipulation re transcript of record on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,
Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By

Deputy.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In-a-Floor Safe Co., Ltd., a corporation,

Defendant-Appellant,

vs.

Diebold Safe & Lock Company,

Plaintiff-Appellee.

APPELLANT'S BRIEF ON APPEAL.

FRED H. MILLER,

Central Bldg., 6th and Main Sts., Los Angeles,

ALFRED E. DENNIS,

Title Guarantee Bldg., 411 W. Fifth St., L. A.,

Attorneys for Defendant-Appellant.

FILED

SEP 11 1936

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No. 8215.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In-a-Floor Safe Co., Ltd., a corporation,

Defendant-Appellant,

vs.

Diebold Safe & Lock Company,

Plaintiff-Appellee.

APPELLANT'S BRIEF ON APPEAL.

INTRODUCTION.

May It Please Your Honors:

This is an appeal from the denial by the District Court of defendant's motion to amend its answer so as to set up a counterclaim charging the plaintiff with infringement of a patent, under which the defendant holds an exclusive license, legal title being in the defendant's president, and praying that the plaintiff be enjoined from such infringement.

Jurisdiction is invoked under section 129 of the Judicial Code, 28 U. S. C. A. 227, as interpreted by

Naivette, Inc., v. Philad Co., 54 Fed. (2d) 623
(C. C. A. 6);

General Electric Co. v. Marvel Rare Metals, 287
U. S. 430;

to the effect that denial of a counterclaim praying for an injunction is tantamount to a denial of the injunction prayed for therein and is therefore appealable under this section.

STATEMENT OF FACT.

The plaintiff, a corporation of Ohio [paragraph 1 of the bill of complaint, Transcript of Record page 4], brought suit against the defendant in the Southern District of California, alleging that the defendant was infringing the plaintiff's patent to William C. Miller, No. 1,965,296, issued July 3, 1934. The defendant has alleged in the proposed counterclaim [paragraph F, Transcript of Record page 24] to have acquired in 1931 an exclusive license by mesne assignments under United States letters patent to Belknap, No. 1,887,866, issued November 15, 1932. The defendant thus secured the exclusive license under the Belknap patent long prior to the commencement of this action by the plaintiff. The dry legal title to the Belknap patent, No. 1,887,866, which may be considered as being held in trust for the benefit of the defendant, still stands in the name of Samuel L. Belknap. He has been since a time before the filing of this suit, and now is, the president and principal stockholder of the defendant. [Paragraph G, Transcript of Record page 25.]

The plaintiff having charged the defendant with infringement of the Miller patent and thus having submitted itself to the jurisdiction of the District Court for the purpose of any counterclaim permitted under the Equity Rules,

General Electric Co. v. Marvel Rare Metals Co.,
287 U. S. 430, *supra*,

the defendant wishes to avail itself of the opportunity to sue the plaintiff for infringement of the Belknap patent under which the defendant holds an exclusive license and thus have the trial of the action based on the Belknap patent take place in the defendant's own jurisdiction—a convenience to defendant—and to have the trial of the two cases take place together—a saving in expense as well as affording the Court an excellent opportunity to thoroughly compare the merits of the plaintiff's Miller patent and the defendant's Belknap patent.

The legal title holder to the defendant's patent being the defendant's president and his not being specifically named as a party defendant in the original suit, the question presented is whether or not under Equity Rule 30 as amended in 1925 Belknap may be brought in as a party so as to have the legal title before the Court in addition to the equitable title of the exclusive-licensee-defendant, which is already before the Court, and thus join the exclusive-licensee-defendant in counterclaiming infringement by the plaintiff of the Belknap patent.

The District Court has denied "the application for leave to assert a counterclaim and to bring in the said Belknap" as a party. [Bottom of page 31, Transcript of Record.]

ASSIGNMENTS OF ERROR.

The assignments of error are that the District Court erred:

- (1) in denying the application for leave to assert a counterclaim;
- (2) in denying the application to bring in Samuel L. Belknap as co-defendant;
- (3) in failing to order that the defendant be granted leave to assert a counterclaim and that Samuel L. Belknap be brought in as co-defendant.

ARGUMENT.

It will be noted at the outset that the plaintiff's Miller patent and the defendant's Belknap patent, copies of which are included in the record, are very similar, and that the defendant's Belknap patent is the earlier in time of filing and in time of issue. Trial of a suit based upon the Miller patent could therefore be easily conducted jointly with a counterclaim based on the Belknap patent.

It is to be noted also that the defendant had the exclusive license under the Belknap patent years before the plaintiff instituted suit and that the case is therefore readily distinguishable from

Texas Co. & Parks-Cramer Co. v. Borne-Scrymser Co., 68 Fed. (2d) 104 (C. C. A. 4);

Borne-Scrymser Co. v. Gaffney Mfg. Co., 5 Fed. Supp. 405;

Prosperity Co., Inc., v. American Laundry Co., 6 Fed. Supp. 515.

Furthermore, it is to be noted that the plaintiff is charged with having infringed the Belknap patent prior to the commencement of the plaintiff's suit. [Transcript of Record page 26.]

The District Court sets forth no reasons why it denied the application to assert a counterclaim or to bring in the party Belknap as a co-defendant.

Our contentions are as follows:

1. In an original infringement suit a defendant owning legal title to a patent that the plaintiff has been infringing may assert a counterclaim charging an equitable cause of action for infringement.

General Electric Co. v. Marvel Rare Metals, 287 U. S. 430;

Leman v. Krentler Arnold Co., 284 U. S. 448;

Equity Rule 30.

2. An exclusive licensee under a patent may join with the legal title holder in prosecuting suits for infringement and if the legal title holder is hostile the exclusive licensee may institute suit in its own name alone and join the legal title holder as a party defendant.

Independent Wireless v. Radio Corporation, 269 U. S. 459.

3. In instituting a suit for infringement or in asserting a counterclaim the legal title to the patent at the time of the infringement must in some way be before the Court either as a party plaintiff or as a party defendant.

Independent Wireless v. Radio Corporation, 269 U. S. 459;

Crown Die v. Nye Tool, 261 U. S. 24.

4. Where the defendant is an exclusive licensee under a patent that the plaintiff is infringing instead of the legal title holder of that patent, the defendant may assert a counterclaim based on the plaintiff's infringement of that patent and cause the legal title holder to be brought in as a defendant under the amendment made in 1925 to Equity Rule 30 providing:

“When in the determination of a counterclaim complete relief cannot be granted without the presence of parties other than those to the bill, the Court shall order them brought in as defendants if they are subject to its jurisdiction.”

Obviously, if no relief whatsoever can be granted in the absence of Belknap under *Independent Wireless v. Radio Corporation*, 269 U. S. 459, *supra*, “complete relief cannot be granted without the presence of” Belknap. The District Court is therefore authorized and in fact ordered by the amendment to Equity Rule 30 to bring in Belknap, the legal title holder to the Belknap patent, to comply with the rule that the legal title must be before the Court.

5. The sole reason for bringing in Belknap as a party defendant is to have the legal title before the Court and thus supplement the equitable title to the Belknap patent which is already before the Court in the exclusive-licensee-defendant. He is not bringing into this case an entirely new cause of action in which the defendant has no interest which is being injected for the first time upon his being made a party.

6. The case is to be distinguished from the line of cases to the effect that an intervener cannot counterclaim, such as:

Chandler & Price Co. v. Brandtjen & Kluge, Inc., et al., 296 U. S. 53;

Brandtjen & Kluge, Inc., v. Joseph Freeman, Inc., et al., 75 Fed. (2d) 472.

In such cases the intervener comes into the case and brings into the case with him for the first time a claim against the plaintiff and in which the defendant has no interest. As stated by Mr. Justice Learned Hand in the latter of these cases:

“On the other hand, the plaintiff has not chosen him (the intervener) as an antagonist; on the contrary, he has intruded himself into the dispute. It is not fair to charge the plaintiff with notice of such cross suits as may be so forced upon him; he cannot be said to have accepted their hazard when he sued the original defendants.”

In the present case, however, where the defendant has had for many years past an exclusive license under the Belknap patent and by virtue of that exclusive license has been manufacturing and selling safes in competition with the plaintiff, it is eminently fair to charge the plaintiff with notice of a cross suit or counterclaim that may be forced upon the plaintiff when the plaintiff institutes suit against the defendant. In so far as the plaintiff was aware, the defendant itself might well have acquired the complete title to the Belknap patent in 1931 instead of merely the exclusive license under it and the plaintiff

might well have expected retaliation by the defendant by a counterclaim charging the plaintiff with infringement of the Belknap patent when the plaintiff brought this suit. It is only circumstance that the defendant has merely the exclusive license under the Belknap patent and not the complete legal title.

A distinction may well be made between this case and the line of cases to the effect that an intervener cannot counterclaim, for in this case the defendant already has the complete equitable interest in the Belknap patent, and has had that interest long before this suit was brought. Had the dry legal title holder, Belknap, been hostile, defendant as exclusive licensee could have initiated an independent suit against the plaintiff and joined Belknap as defendant.

Independent Wireless v. Radio Corporation, 259
U. S. 459, *supra*.

Such suit would have had to be brought in Ohio or in compliance with section 48 of the Judicial Code, 28 U. S. C. A. 109. It is our contention that now that the plaintiff has sued the defendant, who already has the full equitable interest in the Belknap patent, that instead of bringing such an independent suit in a foreign jurisdiction, the defendant may assert the same charge as a counterclaim in this suit. The defendant, of course, had no control over the naming of the parties to the original action, but if it is necessary that the legal title holder be before the Court in order for the defendant to assert its equitable

interest the Court is justified in bringing in Belknap, who is subject to the jurisdiction of the Court as a party defendant under the amendment to Equity Rule 30.

Decisions rendered prior to 1925, the date of the amendment to Equity Rule 30, are not pertinent. See 28 U. S. C. A. following section 723. In this volume at page 191, note 478, there is the following:

“It has been held that a counterclaim which may be set up in the answer must be one which might be the subject of a suit against the complainant and a counterclaim alleging causes of action against others who were not parties and asking that they be made parties held properly stricken out. *Looney v. Thorpe Bros.*, 277 Fed. 367. See also *United States v. Woods*, 223 Fed. 316. *Williams v. Mason*, 7 Fed. (2d) 143. But the amendment of 1925 to Rule 30 apparently overcomes the application of this decision.”

Considering decisions touching on the present question rendered subsequent to the amendment of Equity Rule 30, there are the following:

Hunn et al. v. Lewis et al., 25 Fed. (2d) 271,

wherein the Court stated at page 274:

“The controversy sought to be raised by the cross bill was not one between the cross complainants and the appellee Lewis alone but involved other parties, viz.: Howe . . ., neither of whom was a party to the original bill. *This in itself would not necessarily be fatal, since New Equity Rule 30 provides for the bringing in of new parties necessary to the complete determination of a counterclaim. . . .*”

The counterclaim was refused in that case, however, because "there was no cause of action for contribution stated against Lewis." In

Irving Trust Co. v. Marine Midland Trust Co.,
47 Fed. (2d) 907,

District Judge Wooley categorically stated:

"Neither a cross bill nor a counterclaim may be filed in equity to bring in new parties,"

citing *United States v. Woods* and *Looney v. Thorpe*, which decisions were rendered prior to the amendment in 1925 to Equity Rule 30. Judge Wooley seems to have been ignorant of or oblivious to the fact that Equity Rule 30 was amended in 1925.

7. Belknap is alleged to be president of and the principal stockholder of the defendant corporation. [Paragraph G, Transcript of Record page 25.] The evidence will show that at the time the plaintiff commenced this suit Belknap owned three hundred of the three hundred two shares of capital stock of the defendant corporation. Such being the case, he is personally liable for the acts of the defendant corporation even though he is not specifically named as a defendant. Under such cases as

National Cash Register v. Leland, 94 Fed. 502,
507,

it would seem that he, personally, would be liable not only to be enjoined as an officer of the corporation but also to be personally liable for damages. Being thus jointly liable with the defendant even though not specifically named in the bill of complaint, justice would seem to require that Belknap be afforded all the rights of a defendant as well as the liabilities regardless of whether he is joined as a co-defendant by name or not.

CONCLUSION.

A defendant may in a counterclaim charge the plaintiff with an equitable cause of action for the infringement of a patent. An exclusive licensee may institute an equitable cause of action for infringement and if his legal title holder is hostile he may join him as a defendant. An exclusive licensee may assert a counterclaim charging an equitable cause of action for infringement in the same manner as he may do in initiating an infringement suit. If his legal title holder is hostile, the exclusive licensee can join him in the action not as co-plaintiff, but as co-defendant. The propriety of the exclusive licensee bringing in his legal title holder for counterclaiming purposes cannot depend upon real or feigned hostility of the legal title holder.

As the defendant has no control over the naming of the parties to the bill, the Court is justified in bringing in the legal title holder as defendant under Equity Rules 30 and 37 so as to have the legal title holder before the Court as required by law, regardless of whether the legal title holder is really or feignedly hostile, or friendly as is the case here.

It is urged that the District Court be reversed and ordered to allow the counterclaim to be entered and to bring in Samuel L. Belknap as a party defendant for the sole purpose of having the legal title to the Belknap patent under which the defendant holds an exclusive license before the Court.

Respectfully submitted,

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In the United States
Circuit Court of Appeals
For the Ninth Circuit. 10

In-A-Floor Safe Co., Ltd., a corporation,

Appellant,

vs.

Diebold Safe & Lock Company, a corporation,

Appellee.

APPELLEE'S BRIEF.

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No. 8215.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In-A-Floor Safe Co., Ltd., a corporation,

Appellant,

vs.

Diebold Safe & Lock Company, a corporation,

Appellee.

APPELLEE'S BRIEF.

This case comes before this Court on an appeal by In-A-Floor Safe Co., Ltd. from an order denying defendant-appellant leave to interpose a counterclaim. We shall herein refer to the parties as plaintiff and defendant, as in the court below.

On *December 18, 1934*, plaintiff filed its bill of complaint [R. 4-8] against defendant alleging infringement of the Miller patent No. 1,965,296, granted July 3, 1934.

On *January 7, 1935*, defendant served and filed its answer [R. 9-12]. This answer did not contain any counterclaim, notwithstanding that *Equity Rule 30* requires that:—

“The answer must state in short and simple form any counterclaim arising out of the transaction which

is the subject-matter of the suit, and may, without cross bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, * * *

On *November 9, 1935*, eleven months after answering, defendant filed a motion [R. 13-30] for leave to amend its answer, as per copy entitled "Amended Answer and Counter Claim".

No showing whatever was made or presented explaining why defendant had not complied with the requirements of *Equity Rule 30* and include such purported counterclaim in its answer within the time limited for answering. In support of such motion, defendant stated that it would "rely on all of the papers and proceedings on file in this cause and upon the attached points and authorities", but there was no showing of any fact excusing the failure to include the counterclaim in the original answer.

If the counterclaim had been of the class "arising out of the transaction which is the subject-matter of the suit", then defendant was in default and an application to permit it to thereafter file a counterclaim would have been addressed to the sound legal discretion of the trial court. A showing of facts excusing the default and delay would have been a prerequisite to the court's relieving the defendant of such default and granting such motion. In this case the attempted counterclaim is not of the class which *must* be made. It is of the class which *may* be set up. This is a permission and not an obligation and does not bar the defendant from a cause of action in a counterclaim in an independent suit in equity (Rule 30). Clearly, not having availed itself of the permission of the rule, an

equally, if not stronger, showing of facts excusing the failure to counterclaim in the original answer and the delay in moving was required. In the case at bar, no showing whatever having been made, unless this Court can rule that, notwithstanding *Equity Rule 30*, defendant had the absolute right at any time prior to judgment to counterclaim, the order appealed must be affirmed, as there is nothing before the Court upon which the Court can rule that the district court abused its discretion. Appellant's position seems to be that it had the right to amend its answer as of course and insert the counterclaim *as a matter of right*. We find no provisions of the Equity Rules supporting this position. The right to amend is not of course and as a matter of right. *Equity Rule 19* refers to amendments generally and provides that the court may at any time, in furtherance of justice, upon such terms as may be just, permit any pleading to be amended. *Equity Rule 30* makes but one reference to amendment of an answer:

“but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it.”

Equity Rule 34, referring to supplemental pleadings, provides that upon application of either party the court may, upon reasonable notice and such terms that are just, permit him to file a supplemental proceeding, alleging material facts occurring after his former pleading or of which he was ignorant when it was made. These two rules indicate by analogy, if not directly, that an amendment is within the sound discretion of the court. In fact the cases hold that the action of the trial court in allowing

or disallowing amendments is subject to review only in case of abuse of discretion.—

Ames v. Sullivan, 235 Fed. 880;

Beers v. D. & R. G. W. R. Co., 286 Fed. 886;

Radio Corpn. v. Emerson, 296 Fed. 51;

Electric M. & E. Corpn. v. United P. & L. Corpn.,
19 F. (2d) 311 (C. C. A. 8);

Johnston v. Ouachita Nat. Bank, 40 F. (2d) 604
(C. C. A. 8);

America Land Co. v. Keene, 41 F. (2d) 484, 486,
(C. C. A. 1).

Defendant's original answer [R. 9-12] put in issue the validity of the Miller patent, upon which plaintiff's bill of complaint was grounded, and denied infringement thereof.

Defendant's motion to amend its answer, so far as its defensive allegations were concerned, was not opposed by plaintiff and was granted by consent. The alleged counterclaim is an "independent suit in equity" (Rule 30) grounded upon a patent to Samuel L. Belknap No. 1,887,866. It alleges the grant and delivery of said patent to said Belknap, but does not contain any allegation that said Belknap is the owner or holder of the legal title there-to except inasmuch as the counterclaim alleges the granting of the patent to Belknap and does not show any assignment by him. The counterclaim alleges the grant of a sole and exclusive license to use the invention of the Belknap patent and the acquisition of this license by defendant on January 5, 1931 [R. 24, Par. F]. It alleges that Samuel L. Belknap is now the president of defendant and the principal stockholder thereof; but does not allege when Belknap so became president or principal stockholder. Whether this has been true at all times or was

true at the time of the commencement of this suit is uncertain.

Plaintiff's suit was against defendant, In-A-Floor Safe Co., Ltd. alone. Defendant's counterclaim prays:

"That an order be entered that Samuel L. Belknap be brought in as a defendant, as provided in the last paragraph of Equity Rule 30."

At the time defendant filed its original answer, it knew that the legal title to the Belknap patent was in Belknap. It does not allege any change of title since the commencement of plaintiff's suit. The prayer of the counterclaim that Belknap be brought in as a defendant is ambiguous. It is not clear that the counterclaim seeks to make Belknap a counterclaimant against plaintiff. This, however, must be the import of the prayer because the counterclaim does not set up any facts showing that Belknap is hostile to defendant or refuses to join therein. On the contrary the counterclaim alleges that Belknap "is willing to join the defendant in this counterclaim" [R. 25, Par. G]. The legal title to the Belknap patent being in Belknap, he is a necessary party. It is his rights in the Belknap patent that are alleged to be infringed.

It is well settled that the owner of a patent is a necessary party to a suit to protect the rights of the licensee against an infringer. (*Independent Wireless Tel. Co. v. R. C. A.*, 269 U. S. 459, 70 L. ed. 357; *Six Wheel Corporation v. Sterling Motor Truck Co.*, 50 Fed. (2d) 568—C. C. A. 9.) Any rights of the licensee must be enforced through or in the name of the owner of the patent.

It is the general rule that new parties may not be brought in by counterclaim.

U. S. v. Woods, 223 Fed. 316, at 317 (C. C. A. 8);

Looney v. Thorpe Bros., 277 Fed. 367, at 370 (C. C. A. 8);

Irving Trust Co. v. Marine Midland Trust Co., 47 Fed. (2d) 907;

Atlas Underwear Co. v. Cooper Underwear Co., 210 Fed. 347, 355.

Equity Rule 30, as amended, providing for bringing in of new parties necessary to the complete determination of a counterclaim, presupposes the existence of a counterclaim against plaintiff and the proper statement thereof in the answer. It does not contemplate the bringing in of a new party holding the legal title to the cause of action counterclaimed upon, and without whom the cause of action of the counterclaim is not one which might be the subject of an independent suit in equity by defendant against plaintiff (*Equity Rule 30*). As said by the Circuit Court of Appeals for the Eighth Circuit in *Hunn et al. v. Lewis et al.*, 25 Fed. (2d) 271, at 274:—

“* * * The controversy sought to be raised by the cross-bill was not one between the cross-complainants and appellee Lewis alone, but involved other parties, viz: Howe * * *, neither of whom was a party to the original bill. This in itself would not necessarily be fatal, since New Equity Rule 30 provides for the bringing in of new parties necessary to the complete determination of a counterclaim. But that provision of the rule presupposes the existence of a counterclaim against the plaintiff and the proper statement of it in the answer.”

The situation would be radically different if it were sought to bring in new parties defendant to the counterclaim so that complete relief could be granted. In the present instance no relief whatsoever on the counterclaim could be granted in the absence of Belknap. Without Belknap as a party the counterclaim could not be granted at all, nor could an independent suit in equity be maintained against plaintiff herein without Belknap joining as a plaintiff in such suit.

It is universally held that an intervenor can not file a counterclaim. Examples of this rule are found in cases where the customer is sued for infringement of a patent and the manufacturer assumes the defense of the suit and intervenes for such purpose. Intervention for this purpose will be permitted, but the intervenor manufacturer will not be permitted to counterclaim for infringement of a patent owned by him.

Leaver v. K. & L. Box Lumber Co., 6 Fed. (2d) 666 (D. C. Cal.);

Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U. S. 53, 80 L. ed. 28;

Brandtjen & Kluge, Inc. v. Joseph Freeman Inc., 75 Fed. (2d) 472.

In *Angier v. Anaconda Wire & Cable Co.*, 48 Fed. (2d) 612 (D. C. Del.), the defendant was sued for infringement of plaintiff's patent for Improvement in Packages. One element of the defendant's package was crepe paper. The manufacturer of the crepe paper used by defendant sought to intervene as a party defendant and enjoin the plaintiff from commencing or prosecuting other

or further suits against its customers. In denying this right the Court said at page 613:

“* * * This petitioner, however, is not in the same position as the manufacturer and vendor of an alleged infringing device furnished by it to a defendant. * * * It seeks an opportunity in this suit * * * to set up defenses and seek affirmative relief not available to the defendant. This it should not be permitted to do.”

In *Borne Scrymser Co. v. Gaeffney Mfg. Co., et al.*, 5 Fed. Sup. 405, suit was brought for infringement of plaintiff's patent. The Texas Co., one of the defendants, filed a counterclaim against the plaintiff for infringement of a patent in which The Texas Co. asserted that it had an exclusive license for the cotton and rayon industries, obtained after the bill was filed. Parke-Cramer Co. sought to intervene in support of the counterclaim as the owner, with the exception of The Texas Co.'s license, of the entire equitable and legal title to the patent. The Court, in denying leave to intervene, said at 407:

“* * * An intervening defendant * * * cannot, by the strength of his position, breathe life into a dead lawsuit. It is true that if the original defendant has some standing in the Court, his position may be strengthened by that of an intervening defendant, but the intervening defendant cannot tie his claim to another claim which has no standing at all and by reason of the intervenor's legal position give a proper standing in the Court to the original defendant, who, by virtue of his own position, has none.”

In *Prosperity Co. Inc. v. American Laundry Machinery Co.*, 6 Fed. Sup. 515, suit was filed against defendant for infringement of plaintiff's patent. Defendant moved for leave to file a counterclaim and an order to bring in the United Shoe Machinery Corp. as a party defendant. The latter company was the owner of the patent sought to be brought in in the counterclaim and the defendant was an exclusive licensee in certain fields. The Court, in denying the motion, said at 517:—

“As pointed out by counsel for plaintiff, neither of these cases shows a defendant's right to bring in a third party by way of a counterclaim. They refer to the liberality with which rule 30 shall be interpreted in order to facilitate the prompt disposition of equitable controversies between the same litigants.

“* * * In the instant case, however, it is conceded that the United Shoe Machinery Corporation owns the Bates patent and it follows, therefore, that defendant itself cannot base ‘an independent suit in equity’ (Rule 30) against plaintiff on the Bates patent. Defendant is dependent upon having the United Shoe Machinery Corporation, owner of the title to the Bates patent, joined as a party with it in order to maintain its counterclaim; hence its prayer (in the present motion) that the court order United Shoe Machinery Corporation brought in as a party defendant.

* * * * *

“* * * In the instant case the legal owner is a complete stranger to the litigation, and, as pointed out by counsel for plaintiff in their brief, to now grant the prayer and permit the United Shoe Machinery Corporation to become a party defendant might lead

to the filing of a supplemental bill against the United Shoe Machinery Corporation, and thus the matter become interminable.”

In *Allington v. Shevlin-Hixon Co.*, 2 Fed. (2d) 747, cited with approval by the Supreme Court in 296 U. S. 53, 80 L. ed. 28, *supra*, the Court says at p. 749:

“But, were he not too late, is it clear that an intervening party defendant may set up in his answer every counterclaim of an equitable character that he may have against the plaintiff? Under equity rule 30 the right of an original party defendant to set up in his answer his counterclaims against the plaintiff is very broad. *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 43 S. Ct. 149, 67 L. Ed. 306. It may be that the right of an intervening party defendant with respect to setting up counterclaims is, under equity rule 30, as broad as that of an original party defendant. But to permit, over the objection of the plaintiffs, a person to intervene not *pro interesse suo* only but as a party defendant (as to which see *Chester v. Life Ass’n of Am. (C. C.)*, 4 F. 487) and then to permit such intervening party defendant to set up against the plaintiffs a counterclaim for affirmative relief that is not available to the original defendant, and to which the original defendant is not entitled, would be conferring upon such third person broad rights, indeed, with respect to the litigation, and might be extending the rights of such third person beyond the point intended by equity rules 30 and 37.”

Samuel L. Belknap has made no application to intervene and counterclaim. Such an application would have been denied, and properly upon the foregoing authorities. The case presents the question squarely,—can defendant by

circumlocution do for Mr. Belknap what he would not be permitted to do? Had defendant in its original answer counterclaimed on the Belknap patent, such counterclaim could not be sustained. Defendant had no standing therein in court. The legal title must be before the court. Its owner was an indispensable party. The legal owner cannot be brought in to "breathe life into a dead lawsuit" (5 Fed. Supp. 405, *supra*). No reason is shown why defendant can act for the legal owner, Belknap, and for him and upon his behalf do that which he cannot himself do. This appeal is an appeal by defendant. Belknap has not appeared; he has not sought to join as a party; he is not before the Court. The Supreme Court says the field of litigation is limited to that open to the original parties. (*Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U. S. 53, 80 L. ed. 28, *supra*.)

Plaintiff came into the Southern District of California and subjected itself to the jurisdiction of the district court for a determination of its cause of action against this defendant. Plaintiff did not assert any cause of action against Samuel L. Belknap. By suing defendant in said court plaintiff submitted itself under the Equity Rules to the jurisdiction of said court to determine as between plaintiff and defendant any counterclaim "arising out of the transaction which is the subject-matter" of plaintiff's complaint, i. e., infringement of the Miller patent. Also, any independent suit in equity of defendant against plaintiff. But not, to adjudication in said court of a suit in equity by Belknap.

The jurisdiction of the instant district court in patent cases is

“in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business.” (*Judicial Code*, Sec. 48, 28 U. S. C. A. Sec. 109.)

Plaintiff is not an inhabitant of the Southern District of California. It is an inhabitant of Canton, Ohio. What then has occurred which can be construed to be a waiver by plaintiff of its right to be sued in the Northern District of Ohio, if Samuel L. Belknap desires to sue it for alleged infringement of the Belknap patent? Plaintiff did not bring Belknap into said District Court for the Southern District of California. It asserted no cause of action as to him. And it did nothing to submit the alleged cause of action of Belknap against it for alleged infringement of the Belknap patent to the determination of the District Court of the Southern District of California. When plaintiff filed its suit, defendant had no cause of action against plaintiff. It has none now. The denial of leave to defendant to file a counterclaim (which defendant cannot sustain) should be affirmed because the plaintiff has not submitted itself to the jurisdiction of the Court to be sued therein by Belknap.

In *Cooling Tower Co. v. C. F. Braun & Co.*, 1 Fed. (2d) 178, this Court at page 179 said:

“We are inclined to the view that the word ‘counterclaim,’ as used in the second part of the rule, includes all cross claims upon which the defendant might sue the plaintiff in equity, irrespective of their

connection with the plaintiff's cause of action, *provided that the court would have had jurisdiction of independent suits thereon against the plaintiff.*" (*Italics ours.*)

In *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430, 77 L. ed. 408, it was held that defendant could counterclaim on its own patent against a plaintiff who came into the jurisdiction to litigate its patent. Apparently, the Court assumed that the plaintiff, under such circumstances, waived the right to be sued in the manner provided by statute. If so, this would be in accord with the rule that the question of jurisdiction as to the person may be waived.

Bearing in mind, however, that the plaintiff may have found it necessary to enter the defendant's district to gain jurisdiction in a suit on plaintiff's patent, it would seem that the doctrine of *General Electric Co. v. Marvel*, *supra*, should not be extended (see the reasoning of this court in *Cooling Tower Co. Inc. v. Braun & Co.*, 1 Fed. (2d) 178).

In *Chandler & Price Company v. Brandtjen & Kluge, Inc., et al.*, 296 U. S. 53, 80 L. ed. 28, the Court refused to extend the doctrine of *General Electric Co. v. Marvel* to permit a counterclaim on a patent to be asserted by an intervenor against the plaintiff.

We know of no case in which it has been held that a third party can be brought into a case for the sole purpose of enabling a counterclaim, which otherwise would not lie, to be asserted against a plaintiff.

It appears that the alleged license held by defendant provides:

“8. In case the said Letters Patent shall be infringed the patentees shall, at their own cost, take all necessary proceedings to effectually defend the same; and in default of so doing, it shall be lawful for the licensee, in the name of the patentees and at their cost, to take all necessary proceedings for defending the same; or it shall be lawful for the licensee, by notice in writing given to the patentees or left at the usual or last place of business or residence, to determine this agreement.” [R. 24.]

There is no pleading that the licensor (Belknap) defaulted with respect to his covenant to bring suit for infringement. Defendant has not, therefore, even an equitable right to prosecute suits against infringers, even though it were the rule that it is unnecessary that the owner of the patent be joined as co-plaintiff.

The proffered counterclaim alleges that Samuel L. Belknap is willing to join defendant in the counterclaim [R. 25, par. G]. There is no foundation in the counterclaim for the assertion in defendant's brief that the legal title holder is hostile to the defendant licensee. There is nothing to bring the case presented by the counterclaim within any rule that the licensee may join a hostile owner of the legal title as a party defendant. On the contrary the proffered counterclaim alleges the contrary, and, as pointed out, does not show any default or unwillingness of Belknap to respect his covenant to sue infringers.

It is submitted that the order appealed from should be affirmed—

1. There was no abuse of discretion by the District Court.

2. The alleged counterclaim is one which the defendant itself can not maintain. *Equity Rule 30* does not contemplate the bringing in of another party aligned with the defendant as a co-party to assert a counterclaim against the plaintiff. The counterclaim could only be vitalized by Belknap joining therein.

3. Plaintiff has not submitted itself to the jurisdiction of the United States District Court for the Southern District of California as to any right of action possessed by Belknap. The proffered counterclaim is therefore not within the jurisdiction of the Court, as the Court had no jurisdiction for purposes of such counterclaim over the person of this plaintiff.

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